Municipal Liability Insurance In Ontario

Final Report of the Advisory Committee
to the Minister of Municipal Affairs
November, 1986

PREFACE

The Advisory Committee on Municipal Insurance was established in January, 1986, by the Honourable Bernard Grandmaitre, Minister of Municipal Affairs, to investigate the problems municipalities were experiencing in obtaining adequate liability insurance coverage at reasonable prices. The Committee's initial responsibility was to prepare comments on the insurance "crisis" from the municipal perspective for the Ontario Task Force on Insurance, chaired by Dr. D. Slater. As the terms of reference required, the Committee reviewed and recommended various approaches to resolving these problems in a preliminary report submitted to the Slater Task Force in April, 1986. In the longer term, the Committee was directed to provide advice and recommendations to the Minister of Municipal Affairs on the more detailed aspects of the municipal position, in a final report by the fall of 1986.

To fulfill its mandate, the Committee undertook the most extensive inquiry into the cost and coverage availability problems associated with the municipal liability insurance industry in Ontario ever attempted. While neither this Committee, nor any other, has been able to offer definitive solutions, it has, herein, provided a number of detailed recommendations that, if implemented, will alleviate many of the current uncertainties in the liability insurance market and improve the perception of municipalities as risks within that market.

Numerous presentations have been made and briefs submitted to the Committee, and for this factual and enlightening support, the Committee is grateful.

Special thanks are offered for the significant contribution made by staff of the Ministry of Municipal Affairs. This assistance was provided under the guidance of Mr. L.J. Close, Director, Municipal Finance Branch, and assisted by Mr. Richard Temporale, Senior Economist, Ms. Joan R. Hunter, Economist, and Ms. M. Joan Brush, Economic Assistant, of that Branch, Ms. Sharon Haniford, Solicitor, Legal Services Branch, and Ms. Helen McLean, Intergovernmental Affairs Officer, Provincial-Municipal Affairs Secretariat. Their indefatigable efforts were appreciated.

The Committee also wishes to acknowledge the invaluable participation of Mr. Donald D. McKay, F.I.I.C., General Manager of the Facility Association, past President of the Gore Mutual Insurance Company and past Director of the Insurance Bureau of Canada, as a special advisor.

Finally, the Committee expresses its thanks to the Honourable Bernard Grandmaitre, Minister of Municipal Affairs, for his understanding of the realities facing municipalities in Ontario and for his commitment to ensure their continued viability and integrity.

Chairman:	Mayor Claudette Millar, City of Cambridge
Members:	Mayor Bruce Sinclair, City of Etobicoke
	Mayor Peter Clark, Township of Cumberland

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INTRODUCTION AND SUMMARY OF RECOMMENDATIONS

In accordance with the mandate established by the Honourable Bernard Grandmaitre, the Advisory Committee has reviewed cost and coverage problems as they relate to the availability of municipal liability insurance in Ontario. A number of approaches to resolving these problems have been investigated and are presented herein for consideration.

COST AND COVERAGE QUESTIONS ANSWERED

In its preliminary report released in April of this year, the Committee recommended that the Provincial Government fund an actuarial study to analyze the data obtained from the Committee's Municipal Liability Insurance Information Survey sent to all municipalities. The data collected in the survey produced valuable information on the trends in municipal deductibles, total coverage purchased and the cost of liability insurance over time. This information is referenced extensively in this final report and is consolidated in Appendix A for the reader's information. Unfortunately, as a result of the nature of the current reporting methods of insurers to their municipal clients, the information received, particularly on reserves for unsettled claims and other claims history statistics, was often fragmented and otherwise incomplete. The Committee is thankful to both the Frank Cowan Company and the Ontario Municipal and Education Specialists (OME) for providing the municipal liability insurance policy data at their disposal, which permitted more meaningful analyses to be undertaken.

Essentially, the results of the actuarial study funded by the Ministry of Municipal Affairs and the analyses conducted by the Committee's staff both confirmed that adequate coverage has been and still is available to municipalities, albeit at

substantially higher prices. In fact, the Committee has concluded that the present level of coverage available to municipalities is more than any one municipality should need to purchase, given the claims experience of the municipal sector over the last five years, and provided that the threat of major financial difficulty as the result of a disaster is removed.

The Committee cannot categorically say that the premiums currently being charged the majority of municipalities are commensurate with the claims record for the municipal liability insurance market in Ontario today; but, it can safely predict that on average, they are not too far out of line. As suspected, the actuarial study found that the premiums charged for municipal liability insurance in each of the five years reviewed, from 1981 through 1985, were insufficient to meet the cost of claims experienced, even after investment income from reserves had been considered.

ALTERNATIVE INSURANCE MECHANISMS

The Committee investigated a number of mechanisms, other than the conventional insurance available to municipalities, including captives, group purchase, self-insurance and reciprocal insurance exchanges. In light of the high level of interest expressed in reciprocal insurance exchanges as a possible alternative to conventional insurance for public bodies and the successful implementation of such an exchange for Ontario's school boards this fall, a significant amount of time and energy has been spent reviewing the feasibility of establishing one or more reciprocal insurance exchanges for Ontario's municipalities.

The Committee has reached the conclusion that there are many possible benefits that could accrue over time to a municipality that decides to join a municipal reciprocal insurance exchange; but, the Committee hastens to point out that there

are also a number of considerations well worth discussing. As an example, had the municipal sector, in its wisdom, established a reciprocal exchange in 1981, there is every reason to believe that it would not have fared any better than the conventional insurance industry did in the last five years. In retrospect, a reciprocal insurance exchange would not have been to the economic advantage of Ontario municipalities and those involved would have incurred the same costs resulting from the high frequency and level of claims experienced over the period, as conventional insurers.

On the whole, the Committee believes that municipal reciprocal insurance exchanges are a viable alternative to the conventional liability insurance industry that exists in Ontario today and makes a number of recommendations that should ease their entry into this market. Having said this, the Committee also firmly believes, as pointed out in the preliminary report, that there is not enough competition in the municipal liability insurance market, with or without the existence of reciprocal insurance exchanges. The Committee, therefore, makes a number of recommendations aimed directly at removing some of the uncertainties that currently exist to entice more participation in this long-established market. Important recommendations in this area include the possibility of all municipalities, province-wide, purchasing group insurance of $4 million in excess of $1 million and the setting up of a reserve fund for settlements that surpass this limit.

MUNICIPALITIES AND THE LAW

Of major importance to the resolution of many municipal liability issues are the decisions the Provincial Government must make in the coming months with respect to the current tort system. As discussed in the preliminary report, the broader interpretations of tort law by the courts have played a major role in increasing

both the size of settlements and the exposure to liability that municipalities and other public agencies are facing today. The Slater Report recognized the current tort system's inability to carry out the dual functions of providing compensation and deterrence at the same time and concluded that these inherent problems could not be easily rectified. The Task Force ultimately chose to recommend fundamental change - the complete abandonment of tort in favour of a no-tort insurance compensation system for Ontario. The Committee believes that while a no-tort automobile insurance plan may indeed be the long-term solution to automobile-related liability problems, a universal no-tort compensation plan is unlikely in the foreseeable future.

In the Committee's opinion, the Provincial Government has some difficult choices to make in the coming months. If it chooses to reject the Slater Report's recommendation to abandon the tort system in favour of a no-tort system, then it either implicitly accepts the responsibility of improving the existing tort system or the responsibility of establishing that the existing system is performing adequately. If the Government chooses to accept the Slater Report's recommendation that a no-tort system be introduced at least for auto insurance, then implicitly, it is agreeing that the present tort system cannot be counted on to provide just settlements, either now, or in the future. The Committee recognizes that while auto liability-related cases make up the bulk of tort cases before the courts, there still remains a wide range of other tort cases that are settled out of court, based on previous tort decisions, or are decided on the basis of tort law by a presiding judge. It is for this reason that the Committee devotes an entire chapter to developing recommendations for systematic changes to the statutes of the Province and suggests that the reader weigh heavily the implications of inaction in this area, not only for the municipal sector, but also for the quality of life in our communities as a whole.

RISK MANAGEMENT

The Committee also firmly believes that every municipality has a responsibility and must ensure that all employees are doing everything possible to reduce the corporation's exposure to risk and to provide services in the safest possible manner. While many municipalities are already actively involved in managing their risks, the Committee cannot stress the point strongly enough that risk management, whether it be formal or informal, is no longer an option for any municipality, regardless of size, location or financial limitation. Accordingly, a complete chapter is devoted to ways of making the municipal sector more aware of this important issue, and to providing sources of information which municipalities can utilize in establishing risk-management programs specifically tailored to their individual needs.

With these thoughts and conclusions in mind, the Committee arrived at the following recommendations which it hopes the Province will recognize as urgent and act quickly to implement. The Committee believes that if the issues addressed and the recommendations which follow are successfully implemented, many of the current uncertainties in the liability insurance market will be alleviated and the perception of municipal risks within that market will be improved.

(R1.1) THE COMMITTEE RECOMMENDS THAT ALTHOUGH AUTOMOBILE INSURANCE RATES DO NOT APPEAR TO WARRANT A DEGREE OF CONCERN TO MUNICIPALITIES SIMILAR TO THAT FOR GENERAL LIABILITY INSURANCE RATES, A CONTINUING EFFORT BE MADE BY THE MINISTRY OF FINANCIAL INSTITUTIONS TO MONITOR AUTOMOBILE INSURANCE RATES, IN ORDER TO ENSURE THAT A "CRISIS", SIMILAR TO THE ONE IN THE GENERAL LIABILITY INSURANCE MARKET, DOES NOT OCCUR.

(R1.2) THE COMMITTEE RECOMMENDS THAT MUNICIPAL CORPORATIONS AND OTHER PUBLIC AUTHORITIES IN ONTARIO, WHICH ESTABLISH AN ADEQUATE PLAN WITH APPROPRIATE FINANCIAL GUARANTEES, BE ENTITLED TO AN APPROPRIATE EXEMPTION FROM THE COMPULSORY AUTOMOBILE INSURANCE ACT.

(R1.3) THE COMMITTEE RECOMMENDS THAT MUNICIPALITIES SERIOUSLY CONSIDER THE LEVEL OF RISK THEY CAN RETAIN WITH A VIEW TO ASSUMING THE COST OF HIGHER DEDUCTIBLE LEVELS.

(R1.4) FURTHER, THE COMMITTEE RECOMMENDS THAT MUNICIPALITIES PROVIDE ADEQUATE RESERVES TO COVER THE COST OF CLAIMS FALLING WITHIN THESE INCREASED DEDUCTIBLE LEVELS.

(R1.5) THE COMMITTEE RECOMMENDS THAT A STATUTORY REQUIREMENT BE ENACTED TO ESTABLISH A STANDARD SYSTEM OF REPORTING FOR MUNICIPAL INSURERS TO THE SUPERINTENDENT OF INSURANCE, AND THAT THE INFORMATION TO BE COLLECTED BE BASED ON THE DATA ITEMS OUTLINED IN APPENDIX B. THE COMMITTEE FURTHER RECOMMENDS THAT THE MINISTRY OF MUNICIPAL AFFAIRS BE INVOLVED IN SETTING UP SUCH A DATA BASE TO ENSURE ITS COMPATIBILITY WITH THE EXTENSIVE MUNICIPAL ANALYSIS AND RETRIEVAL SYSTEM (MARS) DATA BASE OF MUNICIPAL STATISTICS ALREADY IN EXISTENCE.

(R1.6) THE COMMITTEE FURTHER RECOMMENDS THAT MUNICIPAL AND INSURANCE REPRESENTATIVES BE GIVEN THE OPPORTUNITY TO REVIEW AND NEGOTIATE THE OUTLINE OF DATA ITEMS REQUIRED IN THE

ESTABLISHMENT OF A PROVINCE-WIDE MUNICIPAL INSURANCE STATISTICAL DATA BASE.

(R2.1) IN ORDER TO ALLEVIATE THE CONCERN OF UNUSUALLY LARGE CLAIMS, THE COMMITTEE RECOMMENDS THAT THE MINISTRY OF MUNICIPAL AFFAIRS ESTABLISH A MUNICIPAL DISASTER LEVEL INSURANCE FUND TO PROVIDE COVERAGE FOR ANY CLAIM EXCEEDING $5 MILLION. THE COMMITTEE SUGGESTS THAT SUCH A FUND BE FINANCED THROUGH A $2 MILLION CONTRIBUTION FROM THE UNCONDITIONAL GRANTS ALLOCATION FOR EACH OF FIVE YEARS, AND BE INVESTED WITH THE ONTARIO MUNICIPAL EMPLOYEES RETIREMENT SAVINGS (OMERS) PLAN.

(R2.2) THE COMMITTEE RECOMMENDS THAT GROUP PURCHASE PROGRAMS FOR THE ACQUISITION OF MUNICIPAL LIABILITY INSURANCE COVERAGE BE RECOGNIZED AS A VIABLE ALTERNATIVE TO CONVENTIONAL INSURANCE ARRANGEMENTS.

(R2.3) THE COMMITTEE RECOMMENDS THAT ALL MUNICIPALITIES CARRY LIABILITY INSURANCE PROTECTION OF $4 MILLION IN EXCESS OF $1 MILLION AND THAT THIS COVERAGE BE PURCHASED BY ALL MUNICIPALITIES, EXCLUDING THE METRO GROUP AND OTHER SUCH MUNICIPALITIES THAT ESTABLISH SELF-INSURANCE PLANS UP TO $5 MILLION, FROM A GROUP PURCHASE PROGRAM ACQUIRED THROUGH THE CONVENTIONAL INSURANCE MARKET. THE COMMITTEE SUGGESTS THAT THE UPPER AND LOWER LIMITS OF THIS COVERAGE BE REVIEWED FOR THEIR APPROPRIATENESS AT THE TIME OF RENEWAL.

(R2.4) FURTHER, THE COMMITTEE RECOMMENDS THAT THIS PROVINCIAL GROUP PURCHASE PROGRAM BE ESTABLISHED BY AN ORGANIZATION, SUCH AS THE ASSOCIATION OF MUNICIPALITIES OF ONTARIO (AMO).

(R2.5) THE COMMITTEE RECOMMENDS THAT MUNICIPAL COUNCILS AND STAFF MAKE A CONCERTED EFFORT TO ASSESS THE DEGREE OF RISK THAT THE MUNICIPAL CORPORATION IS ABLE TO BEAR FINANCIALLY AND CONSIDER THE BENEFITS OF SELF-INSURING THE LARGELY PREDICTABLE NUISANCE CATEGORY OF CLAIMS BY INCREASING GENERAL LIABILITY INSURANCE DEDUCTIBLES AND ESTABLISHING SUFFICIENT RESERVES TO COVER THESE COSTS.

(R2.6) THE COMMITTEE RECOMMENDS THAT VERY LARGE MUNICIPALITIES, SUCH AS METROPOLITAN TORONTO, ITS AREA MUNICIPALITIES, AND OTHER MAJOR URBAN CENTRES, CLOSELY EXAMINE TOTAL SELF-INSURANCE AS AN ALTERNATIVE TO CONVENTIONAL INSURANCE. IN ADDITION, THE COMMITTEE RECOMMENDS THAT RECIPROCAL INSURANCE EXCHANGES WITH SUFFICIENT FINANCIAL CAPACITY CAREFULLY EVALUATE A TOTAL SELF-INSURANCE PROGRAM THAT WOULD ELIMINATE THE NEED TO SEEK EXPENSIVE REINSURANCE, WHICH IS CURRENTLY DIFFICULT TO OBTAIN.

(R2.7) THE COMMITTEE RECOMMENDS THAT THE MINISTRY OF MUNICIPAL AFFAIRS REVIEW AND, IF NECESSARY, AMEND ITS LEGISLATION TO ENSURE THAT IT PROVIDES CLEAR AUTHORITY FOR A MUNICIPALITY TO SELF-INSURE THE CORPORATION'S RISK OF LIABILITY, AND THE LIABILITY OF ITS EMPLOYEES, COUNCILLORS, LOCAL BOARD MEMBERS AND

EMPLOYEES, INCLUDING ANY POWERS NECESSARY AND INCIDENTAL TO THE SAME.

(R2.8) THE COMMITTEE RECOMMENDS THAT RECIPROCAL INSURANCE EXCHANGES BE RECOGNIZED AS A VIABLE ALTERNATIVE FOR THOSE MUNICIPALITIES WHICH CHOOSE NOT TO CONTINUE WITH CONVENTIONAL INSURANCE SERVICES.

(R2.9) THE COMMITTEE RECOGNIZES THAT NOT ALL MUNICIPALITIES MAY VIEW A RECIPROCAL INSURANCE EXCHANGE AS AN APPROPRIATE INSURANCE MECHANISM FOR THEIR NEEDS AND RECOMMENDS THAT PARTICIPATION BE VOLUNTARY.

(R2.10) THE COMMITTEE RECOMMENDS THAT ANY MUNICIPAL RECIPROCAL INSURANCE EXCHANGE CONSIDER UTILIZING THE EXISTING EXPERTISE OF THE ONTARIO MUNICIPAL EMPLOYEES RETIREMENT SAVINGS (OMERS) PLAN TO ADMINISTER THE INVESTMENT OF RESERVE FUNDS.

(R2.11) THE COMMITTEE RECOMMENDS THAT NO RECIPROCAL INSURANCE EXCHANGE BE ESTABLISHED WITHOUT AN INITIAL CAPITALIZATION, SO AS TO ENSURE THAT SURPLUS FUNDS WOULD BE AVAILABLE TO SMOOTH UNANTICIPATED CLAIMS EXPERIENCE.

(R2.12) THE COMMITTEE RECOMMENDS THAT A MUNICIPALITY'S CLAIMS HISTORY, RISK EXPOSURE AND RISK-MANAGEMENT LEVELS BE MADE CLEARLY APPARENT IN ITS LEVY, TO AVOID SOME OF THE DIFFICULTIES OF SELLING THE CONCEPT OF A SINGLE MUNICIPAL RECIPROCAL INSURANCE EXCHANGE TO MUNICIPAL COUNCILS.

(R2.13) THE COMMITTEE RECOMMENDS THAT SUBSECTION 149(2) OF THE MUNICIPAL ACT, WHICH LISTS NUMEROUS OTHER UNDERTAKINGS THAT DO NOT REQUIRE THE APPROVAL OF THE ONTARIO MUNICIPAL BOARD (OMB), BE AMENDED TO INCLUDE A REFERENCE TO AGREEMENTS FOR THE PROVISION OF INSURANCE THROUGH A RECIPROCAL INSURANCE EXCHANGE.

(R2.14) THE COMMITTEE RECOMMENDS THAT THE MINISTRY OF MUNICIPAL AFFAIRS ENACT LEGISLATIVE AMENDMENTS TO PROVIDE CLEAR AUTHORITY TO ENABLE ALL MUNICIPALITIES TO JOIN AND FORM RECIPROCAL INSURANCE EXCHANGES, INCLUDING ANY POWERS NECESSARY AND INCIDENTAL TO THE SAME.

(R2.15) THE COMMITTEE RECOMMENDS THAT THE 3 PER CENT PREMIUM TAX BE WAIVED FOR RECIPROCAL INSURANCE EXCHANGES ESTABLISHED BY PUBLIC BODIES.

(R2.16) THE COMMITTEE RECOMMENDS THAT THE BOARD OF DIRECTORS OF A MUNICIPAL RECIPROCAL INSURANCE EXCHANGE BE CAREFULLY SELECTED AND BALANCED TO PROVIDE SIGNIFICANT PROFESSIONAL REPRESENTATION FOR ALL ASPECTS OF THE UNDERTAKING.

(R2.17)

a) THE COMMITTEE RECOMMENDS THAT MUNICIPALITIES BE INDIVIDUALLY RESPONSIBLE FOR SECURING THE FIRST $1 MILLION OF LIABILITY INSURANCE COVERAGE FROM ANY OF THE CONVENTIONAL OR ALTERNATIVE SOURCES DISCUSSED IN THIS REPORT, WHICH THEY DEEM APPROPRIATE TO SERVICE THEIR NEEDS.

b) **THE COMMITTEE RECOMMENDS THAT GROUP PURCHASE PROGRAMS FOR THE ACQUISITION OF MUNICIPAL LIABILITY INSURANCE COVERAGE BE RECOGNIZED AS A VIABLE ALTERNATIVE TO CONVENTIONAL INSURANCE ARRANGEMENTS (R2.2).**

THE COMMITTEE RECOMMENDS THAT ALL MUNICIPALITIES CARRY LIABILITY INSURANCE PROTECTION OF $4 MILLION IN EXCESS OF $1 MILLION AND THAT THIS COVERAGE BE PURCHASED BY ALL MUNICIPALITIES, EXCLUDING THE METRO GROUP AND OTHER SUCH MUNICIPALITIES THAT ESTABLISH SELF-INSURANCE PLANS UP TO $5 MILLION, FROM A GROUP PURCHASE PROGRAM ACQUIRED THROUGH THE CONVENTIONAL INSURANCE MARKET. THE COMMITTEE SUGGESTS THAT THE UPPER AND LOWER LIMITS OF THIS COVERAGE BE REVIEWED FOR THEIR APPROPRIATENESS AT THE TIME OF RENEWAL (R2.3).

FURTHER, THE COMMITTEE RECOMMENDS THAT THIS PROVINCIAL GROUP PURCHASE PROGRAM BE ESTABLISHED BY AN ORGANIZATION, SUCH AS THE ASSOCIATION OF MUNICIPALITIES OF ONTARIO (AMO) (R2.4).

c) **IN ORDER TO ALLEVIATE THE CONCERN OF UNUSUALLY LARGE CLAIMS, THE COMMITTEE RECOMMENDS THAT THE MINISTRY OF MUNICIPAL AFFAIRS ESTABLISH A MUNICIPAL DISASTER LEVEL INSURANCE FUND TO PROVIDE COVERAGE FOR ANY CLAIM EXCEEDING $5 MILLION. THE COMMITTEE SUGGESTS THAT SUCH A FUND BE FINANCED THROUGH A $2 MILLION CONTRIBUTION FROM THE UNCONDITIONAL GRANTS ALLOCATION FOR EACH OF FIVE YEARS, AND**

BE INVESTED WITH THE ONTARIO MUNICIPAL EMPLOYEES RETIREMENT SAVINGS (OMERS) PLAN (R2.1).

(R3.1) THE COMMITTEE RECOMMENDS THAT THE MINISTER OF MUNICIPAL AFFAIRS ACT IMMEDIATELY TO DESIGNATE THE FOLLOWING PERSONS ONLY AS "EMPLOYEES" FOR THE PURPOSES OF PARAGRAPH 208 (50) OF THE MUNICIPAL ACT:

"SUCH VOLUNTEERS AS MAY PROVIDE THEIR SERVICES ON BEHALF OF, OR DIRECTLY TO, THE MUNICIPALITY, PROVIDED THAT THE COUNCIL OF THE MUNICIPALITY HAS FIRST PASSED A BY-LAW DESIGNATING SUCH PERSONS OR CLASS OF PERSONS AS EMPLOYEES FOR THE PURPOSES OF THE MINISTER'S DESIGNATION."

(R3.2) THE COMMITTEE RECOMMENDS THAT PARAGRAPHS 43 AND 44 OF SECTION 208 OF THE MUNICIPAL ACT BE AMENDED TO ALLOW ALL MUNICIPALITIES, INCLUDING REGIONS, THE AUTHORITY TO DELEGATE TO A COMMITTEE OR MUNICIPAL OFFICER THE POWER TO TEMPORARILY CLOSE ROADS.

(R3.3) THE COMMITTEE RECOMMENDS THAT THE MINISTRIES OF MUNICIPAL AFFAIRS, TRANSPORTATION AND COMMUNICATIONS, AND LABOUR, TOGETHER WITH REPRESENTATIVES OF THE ONTARIO GOOD ROADS ASSOCIATION AND THE ASSOCIATION OF MUNICIPALITIES OF ONTARIO CONDUCT AN IMMEDIATE REVIEW OF THE IMPACT THAT THE HIGHWAY TRAFFIC AND OCCUPATIONAL HEALTH AND SAFETY ACTS HAVE ON THE CONSTRUCTION, MAINTENANCE AND REPAIR OF MUNICIPAL ROADS AND

PROPERTY, SO THAT THE MINISTERS RESPONSIBLE MAY PROCEED AS QUICKLY AS POSSIBLE WITH THE IMPORTANT AMENDMENTS REFERRED TO.

(R3.4) THE COMMITTEE RECOMMENDS THAT THE PROVINCE ESTABLISH A POLICY REQUIRING ALL CABINET SUBMISSIONS INVOLVING AMENDMENTS TO LEGISLATION OR NEW LEGISLATION TO INCLUDE A STATEMENT AS TO WHETHER AND HOW THE PROPOSAL WILL IMPACT ON MUNICIPAL LIABILITY.

(R3.5) THE COMMITTEE RECOMMENDS THAT THE DOCTRINE OF "JOINT AND SEVERAL" LIABILITY ONLY BE APPLIED WHEN NEGLIGENT PERSONS ARE TRULY ACTING IN A JOINT VENTURE. OTHERWISE, EACH DEFENDANT SHOULD PAY ACCORDING TO THE DEGREE OF FAULT DETERMINED BY THE COURTS. THE COMMITTEE FURTHER RECOMMENDS THAT THE ONTARIO LAW REFORM COMMISSION DESIGN APPROPRIATE LEGISLATION TO REFLECT THIS CHANGE AS QUICKLY AS POSSIBLE AND THAT THE ATTORNEY GENERAL IMPLEMENT SUCH LEGISLATION WITHOUT DELAY.

(R3.6) THE COMMITTEE RECOMMENDS THAT THE COURTS OF JUSTICE ACT BE AMENDED TO PROVIDE THAT, IN ACTIONS INVOLVING BODILY INJURY, PREJUDGMENT INTEREST WITH RESPECT TO NON-PECUNIARY LOSS NOT COMMENCE UNTIL THE PLAINTIFF HAS EITHER:

1. **DISCLOSED TO THE DEFENDANT, OR THE DEFENDANT'S INSURER, THE EXTENT AND NATURE OF THE INJURIES SUSTAINED; OR**

2. **THE PLAINTIFF HAS AGREED TO MAKE HIMSELF OR HERSELF AVAILABLE FOR A MEDICAL EXAMINATION ON REASONABLE NOTICE, AND THAT THE DEFENDANT WILL PAY ALL RELATED EXPENSES**

INCURRED AND SUPPLY A COPY OF THE REPORT UPON RECEIPT TO THE PLAINTIFF.

(R3.7) THE COMMITTEE RECOMMENDS THAT THE ATTORNEY GENERAL AMEND SECTION 129 OF THE COURTS OF JUSTICE ACT TO GIVE THE COURTS AUTHORITY TO IMPOSE STRUCTURED SETTLEMENTS FOR ALL, OR ANY PART OF AN AWARD, IN APPROPRIATE CIRCUMSTANCES.

(R3.8) THE COMMITTEE RECOMMENDS THAT THE PROVINCE OF ONTARIO REQUEST THE FEDERAL GOVERNMENT TO BROADEN THE CATEGORIES OF DEFENDANTS IN THE INCOME TAX ACT WHO CAN BE INVOLVED IN STRUCTURED SETTLEMENTS WITHOUT SUFFERING ADVERSE TAXATION.

(R3.9) THE COMMITTEE RECOMMENDS THAT THE PROVINCE OF ONTARIO DIRECT THE FEDERAL GOVERNMENT TO FOREGO COLLECTING THE PROVINCIAL SHARE OF THE PERSONAL INCOME TAX ON LUMP-SUM AWARDS IMMEDIATELY AND THAT IT REQUEST THE FEDERAL GOVERNMENT TO FOLLOW SUIT BY REMOVING THE INHERENT UNFAIRNESS IN THE INCOME TAX ACT THAT REQUIRES THE COLLECTION OF PERSONAL INCOME TAXES ON THE INCOME GENERATED BY LUMP-SUM AWARDS.

(R3.10) THE COMMITTEE RECOMMENDS NO CHANGE TO THE CURRENT LAWS RESPECTING COLLATERAL BENEFITS.

(R3.11) THE COMMITTEE RECOMMENDS THAT THE MINISTER OF HEALTH AND THE SUPERINTENDENT OF INSURANCE IMPLEMENT A UNIVERSAL OHIP SUBROGATION PROGRAM THAT WOULD REMOVE THE COST OF OHIP-RELATED MEDICAL CARE COMPLETELY FROM THE TORT SYSTEM.

(R3.12) THE COMMITTEE RECOMMENDS THAT THE INSURANCE BUREAU OF CANADA MONITOR THE IMPACT OF THE AMENDMENTS TO THE FAMILY LAW ACT, 1986 AND JUSTIFY THE NEED FOR FURTHER CHANGE.

(R3.13) THE COMMITTEE RECOMMENDS THAT A SUBCOMMITTEE OF THE ASSOCIATION OF MUNICIPALITIES OF ONTARIO (AMO) BE SET UP TO DEMONSTRATE TO THE ATTORNEY GENERAL'S STAFF, THE VERY REAL AND TANGIBLE CONCERNS MUNICIPALITIES HAVE WITH THE PRACTICAL APPLICATION OF LIMITATION PERIODS, WITH THE HOPE THAT A WORKABLE APPROACH TO MUNICIPAL NOTICE AND LIMITATION PERIODS CAN BE ACHIEVED THAT WILL SATISFY ALL PARTIES.

(R3.14) THE COMMITTEE RECOMMENDS THAT NO FURTHER CAPPING OF AWARDS BE CONSIDERED.

(R3.15) THE COMMITTEE RECOMMENDS MUNICIPALITIES BE ACCORDED THE RIGHT TO POST THEIR POLICIES CONCERNING THE USE OF THOSE MUNICIPAL PREMISES ENUMERATED IN SUBSECTION 4(4) OF THE OCCUPIERS' LIABILITY ACT AT VARIOUS STRATEGIC LOCATIONS WITHIN THE MUNICIPALITY AND THAT SIGNAGE BE EFFECTIVE TO BRING INTO PLAY THE LESSER DUTY OF CARE SET OUT IN SUBSECTION 4(1) OF THAT ACT, IN RESPECT OF THOSE LISTED PREMISES.

(R3.16) THE COMMITTEE ALSO RECOMMENDS THAT SUBSECTION 4(4) OF THE OCCUPIERS' LIABILITY ACT BE EXPANDED TO INCLUDE THE FOLLOWING PREMISES AS BEING SUBJECT TO THE LESSER DUTY OF CARE SET OUT IN SUBSECTION 4(1) OF THAT ACT:

1. VACANT UNDEVELOPED PREMISES OWNED BY A MUNICIPALITY OR LOCAL BOARD THEREOF, AS DEFINED IN THE MUNICIPAL AFFAIRS ACT; AND

2. RECREATIONAL LANDS OWNED BY A MUNICIPALITY OR LOCAL BOARD THEREOF, AS DEFINED IN THE MUNICIPAL AFFAIRS ACT, WHEN SUCH LANDS ARE USED FOR THE PURPOSES OF RECREATIONAL ACTIVITY BY PERSONS IN RESPECT OF WHOM THE MUNICIPALITY OR LOCAL BOARD DOES NOT ASSUME DIRECT SUPERVISION OR CONTROL.

(R3.17) THE COMMITTEE RECOMMENDS THAT THE MINISTRIES OF FINANCIAL INSTITUTIONS AND MUNICIPAL AFFAIRS PARTICIPATE WITH THE ASSOCIATION OF MUNICIPALITIES OF ONTARIO (AMO) AND THE MAJOR MUNICIPAL INSURERS IN THE PREPARATION OF MANDATORY STANDARD MUNICIPAL INSURANCE CLAUSES, TO BE USED IN THE PROVISION OF, AND WHEN QUOTING ON, ALL MUNICIPAL INSURANCE POLICIES.

(R3.18) THE COMMITTEE RECOMMENDS THAT THE MINISTRY OF THE ENVIRONMENT, IN COOPERATION WITH THE ASSOCIATION OF MUNICIPALITIES OF ONTARIO (AMO), SET UP A SERIES OF MUNICIPAL SEMINARS ACROSS THE PROVINCE, ON A ZONE BASIS, TO DEAL WITH THE SPILLS BILL, THE SPILLS ACTION CENTRE, AND THE TRANSPORTATION OF DANGEROUS GOODS.

(R3.19) THE COMMITTEE RECOMMENDS THAT THE MINISTRY OF THE ENVIRONMENT REIMBURSE MUNICIPALITIES DIRECTLY AND PROMPTLY FOR

THE COSTS THEY INCUR IN THE CLEAN-UP OF ANY SPILL FOR WHICH THEY ARE NOT DIRECTLY RESPONSIBLE.

(R3.20) THE COMMITTEE RECOMMENDS THAT EACH MUNICIPALITY DESIGNATE AN EMERGENCY NUMBER THAT CAN BE CALLED AFTER NORMAL BUSINESS HOURS IN CASE OF AN EMERGENCY. FURTHER, THE COMMITTEE RECOMMENDS THAT THE MINISTRY OF MUNICIPAL AFFAIRS LIST THIS EMERGENCY NUMBER IN THE MUNICIPAL DIRECTORY PUBLISHED EACH YEAR.

(R4.1) THE COMMITTEE RECOMMENDS THAT THE MINISTRY OF MUNICIPAL AFFAIRS ADDRESS AN URGENT NEED AND PROVIDE THE NECESSARY FINANCING TO ALLOW THE URBAN FINANCE OFFICERS ASSOCIATION (UFOA), IN COOPERATION WITH THE ASSOCIATION OF MUNICIPALITIES OF ONTARIO (AMO), TO PRODUCE A TIMELY RISK-MANAGEMENT HANDBOOK, FOR USE BY BOTH LARGE AND SMALL MUNICIPALITIES. SUCH FUNDING SHOULD INCLUDE THE COST OF PUBLICATION, CIRCULATION AND ANY EXPERT ASSISTANCE REQUIRED, TO PRODUCE A COMPREHENSIVE MUNICIPAL RISK-MANAGEMENT HANDBOOK FOR ALL MUNICIPALITIES IN ONTARIO, AS EARLY IN 1987 AS POSSIBLE.

CHAPTER ONE - COST AND COVERAGE QUESTIONS ANSWERED

COMMITTEE POSITION ON COST AND COVERAGE

In the preliminary report, the Committee stated that the majority of municipalities in the province experienced premium increases of between 50 and 350 per cent for their 1986 liability insurance coverage. While the Committee acknowledged that this increase was not burdensome to most municipalities, it questioned the relationship of the increases to the actual claims experience of municipalities over the last several years.

The Committee had been advised that the premium increases were necessitated by the unusually high loss ratios experienced by insurance companies over the last several years on the municipal liability line of coverage. The statistical study, conducted by casualty actuaries, confirms this point. For each dollar of general liability premium income received between 1981 and 1985, a weighted average of approximately $1.55 was paid out in claims by municipal insurers, before any allowance for commissions or other expenses was made.

The study also determined that, given the experience of the period 1981 to 1985, it was unlikely that a reciprocal insurance exchange or any other alternative insurance mechanism could have provided the same coverage to municipalities for a lower cost than the conventional insurance industry had over the same period.

While the level of coverage available to municipalities has been restricted, the Committee continues to believe that adequate coverage is available, albeit at a substantially higher price than two years ago. It also believes that many municipalities can afford to retain a higher level of risk by increasing deductible

levels to self-finance the relatively predictable cost and frequency of nuisance claims under a certain threshold.

It is the Committee's belief that the cost of insurance and the amount of coverage that was available to municipalities during 1981 and 1985 has proven not to have been unrealistic or burdensome to most municipalities.

However, the Committee believes that the "crisis" has graphically demonstrated the ability of, and necessity for, municipalities to take a responsible role in determining their coverage requirements, the level of deductible they can afford to retain, and the degree to which they can work to improve their claims history through identifying, evaluating and controlling their risks. All of these will help alleviate some of the uncertainties involved in forecasting future costs and improve the perception of municipal risk. Together with the recommendations contained in this report, coverage availability and municipal liability insurance premium stability should ultimately improve.

SURVEY OF MUNICIPALITIES

Late in February, 1986, the Advisory Committee distributed a survey to all municipalities entitled "Municipal Liability Insurance Survey". The survey sought historical statistics, which the Committee wished to utilize, to evaluate the premium and claims experience of municipalities, to evaluate the viability of alternatives to the existing insurance markets, and to determine the requirements of a standardized data bank of municipal insurance statistics. The Committee would like to thank all of the municipalities that participated in the survey and is particularly thankful to those which were able to meet the tight deadline of March 31 for Part I.

The response was most encouraging. More than half of the 839 municipalities in Ontario submitted Part I and almost 400 replies were received for Part II.

Part I of the survey was analyzed by Committee staff and will be discussed in the following section of this chapter. This discussion provides an historical perspective of average general liability premiums, deductibles and limits from 1981 through 1986, as they were reported by those municipalities participating in the survey. It is important to note that statistical adjustments to account for differences in premiums due to varying deductible levels were not made. However, the data was weighted to more accurately reflect the relative influence of the information. Further, due to the unique nature of the charges levied against members of the Metro Group's self-insurance program, municipalities within Metropolitan Toronto were excluded from the determination of provincial premium averages. While the Cities of North York and Scarborough do not participate in the Metro Group insurance program, they were also excluded. However, the experience of the Metropolitan Toronto municipalities can be viewed in the tables located in Appendix A, which detail the analysis of Table One for each sector.

Subsequent to the Committee's recommendation that the Province fund a statistical study dealing with the information obtained in the survey of municipalities, an analysis of claims experience data, with some reference to premium histories, was conducted for the Committee by casualty actuaries, Robert Brown, F.S.A., F.C.I.A., A.C.A.S., and Harry Panjer, Ph.D., F.S.A., F.C.I.A. The recommendation for this study was strongly supported by the Association of Municipalities of Ontario and many individual municipalities and organizations. The actuaries utilized claims data covering the accident period, 1981-1985, and analyzed it in size bands of $0-5,000, $5-10,000, $10-25,000, $25-50,000, $50-100,000 and over $100,000. Most of the larger losses for this period are not yet settled and the incurred costs were therefore estimated and

expressed in 1986 dollars. Since a large proportion of past losses remain unsettled, and hence in 1986 dollars, no attempt was made to adjust settled old losses to a current dollar status. The results of Mr. Brown and Dr. Panjer's research will also be discussed later in this chapter and at various points throughout the report.

Automobile Results

It should be noted at this time that the survey provided information on automobile, as well as general liability insurance. Analysis of the automobile insurance data revealed trends similar to those visible in general liability insurance, but to a far lesser degree. These trends included increased premiums, limits and deductible levels; however, the rise was at a more gradual pace and did not exhibit the severe increases that appeared in general liability insurance.

Upon reviewing the analysis of municipal automobile insurance information contained in Table One of the survey, the Committee arrived at the conclusion that the automobile insurance market was not posing as significant, nor as negative, an impact on municipalities as general liability, at this time. This gradual progression of rates may perhaps be due in part to the availability of automobile insurance statistics for review and the higher level of predictability of risks likely to be encountered. Both these factors are made possible through the existing mandatory requirement of reporting automobile information to the Superintendent of Insurance.

(R1.1) THE COMMITTEE RECOMMENDS THAT ALTHOUGH AUTOMOBILE INSURANCE RATES DO NOT APPEAR TO WARRANT A DEGREE OF CONCERN TO MUNICIPALITIES SIMILAR TO THAT FOR GENERAL LIABILITY INSURANCE RATES, A CONTINUING EFFORT BE MADE BY THE MINISTRY OF FINANCIAL INSTITUTIONS TO MONITOR AUTOMOBILE INSURANCE RATES, IN ORDER

TO ENSURE THAT A "CRISIS", SIMILAR TO THE ONE IN THE GENERAL LIABILITY INSURANCE MARKET, DOES NOT OCCUR.

Further, the Committee believes that any municipality which maintains self-insurance should be exempt from the requirements of the Compulsory Automobile Insurance Act, which does not permit such municipalities to issue a certificate of insurance and therefore a motor vehicle liability insurance card. Such municipalities are forced to enter into unnecessarily complex and costly "fronting" arrangements with licensed automobile insurers, solely to obtain "pink slips" for their automobiles.

For example, in order to comply with the Compulsory Automobile Insurance Act, the five municipalities participating in the Metro Toronto self-insurance group were forced to purchase such a "fronting policy" from a major insurance company. This policy, which cost the Metro Group $25,000, permitted the insurance company to produce certificates of insurance for all the vehicles owned by the municipalities involved. However, all costs associated with claims arising out of this policy were the responsibility of the Metro Group.

In view of:

- the fact that municipalities in Ontario have the resources and expertise to establish a plan for self-insurance with suitable administrative and financial guarantees for the payment of claims;

- the current capacity problems in the Ontario insurance market; and,

provincial and municipal initiatives to promote self-insurance through reciprocal insurance exchanges,

the Committee cannot see the rationale for this requirement for municipalities and other public authorities.

(R1.2) THE COMMITTEE RECOMMENDS THAT MUNICIPAL CORPORATIONS AND OTHER PUBLIC AUTHORITIES IN ONTARIO, WHICH ESTABLISH AN ADEQUATE PLAN WITH APPROPRIATE FINANCIAL GUARANTEES, BE ENTITLED TO AN APPROPRIATE EXEMPTION FROM THE COMPULSORY AUTOMOBILE INSURANCE ACT.

General Liability Results

For the purposes of this report, the Committee will address only the analysis of general liability insurance as it affects Ontario municipalities.

For the years 1981 to 1985, the number of responses were fairly consistent, ranging from 467 to 510 municipalities. Fewer responses containing data for 1986 were received, 224, which was largely attributable to the inability of municipalities to report on policy renewals occurring after the March, 1986 submission deadline for the survey. The composition of the sample is detailed by sector and year in Table 1 of Appendix A.

Although the number of respondents varies from year to year, the sample for each year remains representative. Each sector represents approximately the same percentage of the total sample as it does in the actual provincial breakdown of municipalities and therefore provides a solid basis on which to determine averages and draw conclusions on a province-wide basis.

I - Part I - Table One

An analysis of the general liability insurance data revealed that average premium increases for the six sectors ranged between 50 and 270 per cent, in 1986 (see Table 2, Appendix A). As the analysis of premium increases was completed on a sectoral basis, the table does not illustrate the fact that individual municipalities experienced premium increases ranging up to approximately 800 per cent in 1986. More than 30 of the 224 municipalities in the 1986 sample experienced premium increases in 1986 in excess of 270 per cent. While cities and separated towns located in counties (county cities) experienced their sharpest increase in 1985, the other sectors witnessed truly dramatic increases in their liability insurance premiums in 1986. **These findings were consistent with the Committee's determination in the preliminary report that municipal general liability insurance premiums had increased between 50 and 350 per cent.**

On average, premiums per municipality increased almost 147 per cent in 1986. While this increase is substantial itself, it further compounds the total premiums for 1986 to a very high level. Average premium costs per municipality, excluding Metropolitan Toronto and its area municipalities, rose from a low of $28,000 in 1981 to a high of $187,000 in 1986, an increase of almost 570 per cent over five years. (See Figure 1 Appendix A).

On a per household basis, general liability premiums, excluding Metropolitan Toronto and its area municipalities, increased very marginally in the early 1980's and were on average approximately $2.00. However, the general liability insurance "crisis" quickly became evident in the data, as premiums per household began to rise significantly in all sectors. While on average, premiums per household (lower tier plus upper tier) increased about 5.0 per cent in 1986, to about $7.75, cities and separated towns located in counties (county cities) experienced an increase of 7.0 per cent (see Figure 2 and Table 3, Appendix A).

The Committee found that general liability premiums represented a very small percentage of the net general dollar levy in all sectors of the Province and that the percentage varied according to the size of the municipality and consequently the amount of the municipal levy. For example, on average, premiums represented about 0.5 per cent of net general dollar levy in 1986 for all municipalities, excluding those in Metropolitan Toronto, but ranged from 0.42 per cent in regions to 1.03 per cent in counties, which contain small towns, townships and villages. (see Table 4, Appendix A).

For the province as a whole, the premiums as a percentage of net general dollar levy were relatively constant at less than 0.2 per cent prior, to 1985. As premiums escalated, this figure rose to a high of 0.5 per cent in 1986 (see Figure 3, Appendix A). **The Committee concluded that although the sharp increases in premiums were sudden and therefore difficult to absorb into the current year's budgets, the increases represented minor portions of municipal budgets on the whole. Therefore, in the overall municipal context, increases in liability premiums had not been burdensome for most municipalities, even in 1985 and 1986.**

A significant shift is easily recognizable in the levels of deductible being retained by municipalities. Deductible levels remained fairly constant from 1981 to 1985, with almost 90 per cent of all municipalities utilizing a deductible of less than $600 per occurrence. By 1986, about 15 per cent of municipalities within that group had increased their deductibles to somewhere within the $600 - $2000 or the $5000 and over ranges (see Figure 4, Appendix A). While this increase in deductible levels may ultimately be desirable, it was of some concern to the Committee that many municipalities were forced, without much warning, to increase deductible levels in an effort to lower premium costs. (See discussion of deductible levels in Chapter Two).

(R1.3) THE COMMITTEE RECOMMENDS THAT MUNICIPALITIES SERIOUSLY CONSIDER THE LEVEL OF RISK THEY CAN RETAIN WITH A VIEW TO ASSUMING THE COST OF HIGHER DEDUCTIBLE LEVELS.

(R1.4) FURTHER, THE COMMITTEE RECOMMENDS THAT MUNICIPALITIES PROVIDE ADEQUATE RESERVES TO COVER THE COST OF CLAIMS FALLING WITHIN THESE INCREASED DEDUCTIBLE LEVELS.

Policy limits for general liability insurance have changed even more dramatically since 1981 than deductible levels (see Figure 5, Appendix A). In 1981, almost 75 per cent of municipalities in Ontario carried general liability insurance policies for $5 million or less. By 1986, only 12 per cent of municipalities carried this level of insurance coverage. Municipalities raised their policy limits so dramatically over this five-year period that by 1986, 88 per cent held coverage in excess of $5 million, more than half of these municipalities held $10 million or more. This dramatic shift illustrates the availability of a standard-protection package, in the early 1980's, which included relatively inexpensive excess insurance coverage up to $5 million. As excess insurance coverage increased in cost and its availability became restricted, the distribution of general liability limits became increasingly varied. A full discussion of coverage levels and the Committee's position and recommendations in that regard can be found in Chapter Two.

I - Part II - Municipal Claims History

The number of claims per year for all municipalities increased steadily from 1981 to 1985, by about 60 per cent. However, major year-to-year increases occurred only in cities and regional municipalities. The frequency of claims for villages, townships, towns and counties remained relatively level. The largest number of these claims,

approximately 90 per cent, were less than $5000 and on average were less than $600, individually. The average claim size also increased steadily from 1981 to 1984, by about 170 per cent. A comparison of premiums to claims indicated that for each dollar in premium income, approximately $1.55 was paid out in claims by municipal insurers over this period, before any allowance for commissions or other expenses. This amount varied from $1.40 to $1.90, depending on the actuarial adjustments that were made.

The data show that in the aggregate, claims experience under $100,000 has been very consistent since 1981. This consistency is clouded somewhat by the fact that deductible levels have increased over time and this increased self-retention has all but eliminated the insurance companies' involvement with, and knowledge of the lower level claims. Nevertheless, it would appear that the variability of the insurance risk under $100,000 is low enough to allow for credible forecasting and budgeting by an insurer.

This is not to say that the economic risk to any participating municipality is necessarily low but rather, by pooling a large number of relatively small insurance risks, a group of similar municipalities could reduce overall risk by improving the predictability of claims. Such a pooling of risk, whether through a conventional insurance company or a reciprocal insurance exchange, significantly diminishes the total economic risk for all participants and should ultimately reduce the cost.

STATISTICAL DATA BASE REQUIREMENTS

As indicated in the preliminary report, reliable historical insurance information does not exist in aggregate for municipalities and what is available on an individual municipal basis is difficult to obtain in any comprehensive manner. The Slater Task

Force discovered the same problems with respect to securing adequate information for all commercial lines of insurance.

Municipalities, while aware of their premium levels, often do not have ready access to information on their paid claims, including legal and adjusting costs. Seldom, if ever, are they privy to their insurers' reserves for claims incurred but not yet paid. Insurance companies offering general liability coverage, are not required to conform to any formal statistical reporting procedures for municipal business.

By comparison, the automobile insurance industry is under a statutory obligation to collect and store policy data in a standardized and regulated format to facilitate their reporting to the Superintendent of Insurance. Detailed and comprehensive analyses and reports are then readily available to insurees and insurers alike.

The Committee recommended in the preliminary report that a statutory requirement be enacted to establish, for municipal insurers, a standard system of reporting to the Superintendent of Insurance, similar to that which exists for automobile insurers, in order to provide a consistent statistical base. The Slater Task Force made a similar recommendation to mandate the collection of specific data and information for non-automobile commercial lines of insurance.

Given this belief, the Committee included in its statistical study, a directive for the actuaries to identify the data items required in order for the Province of Ontario to establish a consistent and meaningful statistical data base for province-wide insurance reporting, similar to that in existence for automobile insurance.

The study substantiated the Committee's belief that such a requirement would be beneficial and further advised that the collection of municipal liability insurance

statistics would be useful for the following reasons:

- given the existence of such statistics, a periodic actuarial review of said statistics would be possible and advisable;

- companies wishing to enter and compete in the municipal liability insurance field could do so with a greater sense of credibility and security;

- companies already in the business would be able to predict future claims costs, and hence, future premiums, more accurately;

- alternatives to private insurance, such as reciprocal insurance exchanges, would have data available to analyze the feasibility of their pricing structures;

- it should be possible to enhance the accuracy of experience rating, so as to provide an extra economic incentive to risk management;

- reinsurance pricing would be easier and more accurate, which would enhance its availability and price.

Mr. Brown and Dr. Panjer also outlined the data that would be required in such a data base to allow credible analyses of the municipal liability insurance experience over time. These requirements can be found in Appendix B.

Currently, the Ministry of Municipal Affairs collects up to 3,500 pieces of information on each municipality in the Province every year. This information is stored in the Municipal Analysis and Retrieval System (MARS) and is available to all municipalities and the public. It would be extremely useful for anyone wishing to carry out research

in future, if the data items collected by the Superintendent of Insurance on municipal insurance could be integrated, or made accessible in similar formats, with the financial and demographic statistics collected by the Ministry of Municipal Affairs.

(R1.5) THE COMMITTEE RECOMMENDS THAT A STATUTORY REQUIREMENT BE ENACTED TO ESTABLISH A STANDARD SYSTEM OF REPORTING FOR MUNICIPAL INSURERS TO THE SUPERINTENDENT OF INSURANCE, AND THAT THE INFORMATION TO BE COLLECTED BE BASED ON THE DATA ITEMS OUTLINED IN APPENDIX B. THE MINISTRY OF MUNICIPAL AFFAIRS SHOULD BE INVOLVED IN SETTING UP SUCH A DATA BASE TO ENSURE ITS COMPATIBILITY WITH THE EXTENSIVE MUNICIPAL ANALYSIS AND RETRIEVAL SYSTEM (MARS) DATA BASE OF MUNICIPAL STATISTICS ALREADY IN EXISTENCE.

(R1.6) THE COMMITTEE FURTHER RECOMMENDS THAT MUNICIPAL AND INSURANCE REPRESENTATIVES BE GIVEN THE OPPORTUNITY TO REVIEW AND NEGOTIATE THE OUTLINE OF DATA ITEMS REQUIRED IN THE ESTABLISHMENT OF A PROVINCE-WIDE MUNICIPAL INSURANCE STATISTICAL DATA BASE.

REINSURANCE

In its preliminary report, the Committee stated that reduced reinsurance coverage provided by international companies had been identified as a major contributing factor to increased liability insurance premiums. Late in February of this year, the Honourable Monte Kwinter, Minister of Financial Institutions, suggested that the Canadian Insurance Exchange, which was first proposed in November, 1982, could be operative as early as January, 1987.

The Committee wishes to congratulate the Minister of Financial Institutions for his effort in moving forward with this proposal. It is the Committee's understanding that the Canadian Insurance Exchange will be operative early in 1987 and that such an Exchange could eventually prove to be a successful means of insulating the municipal liability market from foreign risks.

CHAPTER TWO - ALTERNATIVE INSURANCE MECHANISMS

Numerous representations were made to the Committee, over the course of its deliberations, in support of non-conventional insurance mechanisms that were purported to be solutions to the municipal "crisis" or, at the very least, viable alternatives to the conventional insurance market. All such alternatives were given careful consideration and the Committee's findings are discussed below. Recognizing that a reciprocal insurance exchange would be a reality for at least one other group of publicly supported organizations, the school boards, and that municipalities might well have a similar option in the near future, the Committee devoted a significant amount of its time and effort to an evaluation of the viability of reciprocal insurance exchanges for municipalities.

DISASTER LEVEL COVERAGE

The Committee stated in the preliminary report that it believed that municipalities should not be required to insure for the eventuality of a "disaster" that could place an unrealistic strain on their fiscal capacity. True disasters involving multiple claims and horrendous injuries occur rarely and should be considered above and beyond municipalities' normal exposure.

Municipalities are, however, increasingly requesting coverage in excess of $10 and $20 million per occurrence to ensure the adequate protection of their resources. In fact, such limits are far in excess of any claims settled to date and the Committee believes that it is ineffective and inefficient for municipalities to be purchasing liability insurance coverage beyond $5 million.

The Committee has been advised that $2 million collected from the unconditional grants program, for each of five successive years and managed by an investment organization with the success and expertise of OMERS could generate sufficient capital, without further start-up costs, to look after future municipal claims beyond $5 million. The establishment and maintenance of this fund would be a burden to neither the Province nor municipalities. Further, the small amount municipalities might miss from their unconditional grants during this period would be offset by the corresponding decrease in the premium cost for coverage beyond this level. After the five years, this decreased cost would be realized as a true saving by municipalities. Further, the monies within such a fund would be municipal funds, simply entrusted to a third party, such as OMERS, for its management.

The Committee believes that the removal of this concern from the local level would be an immediate benefit to municipalities and would be welcomed by the insurance industry as yet another uncertainty removed in the provision of the municipal line of coverage. Indeed, it could enhance the cost and availability of coverage below $5 million, as it would clearly cap the risk of any insurance mechanism at this point. In particular, municipalities would no longer need to fear the unlimited liability for that implicitly self-insured level above and beyond the coverage they have obtained.

(R2.1) IN ORDER TO ALLEVIATE THE CONCERN OF UNUSUALLY LARGE CLAIMS, THE COMMITTEE RECOMMENDS THAT THE MINISTRY OF MUNICIPAL AFFAIRS ESTABLISH A MUNICIPAL DISASTER LEVEL INSURANCE FUND TO PROVIDE COVERAGE FOR ANY CLAIM EXCEEDING $5 MILLION. THE COMMITTEE SUGGESTS THAT SUCH A FUND BE FINANCED THROUGH A $2 MILLION CONTRIBUTION FROM THE UNCONDITIONAL GRANTS ALLOCATION FOR EACH OF FIVE YEARS, AND BE INVESTED WITH THE ONTARIO MUNICIPAL EMPLOYEES RETIREMENT SAVINGS (OMERS) PLAN.

GROUP PURCHASE PROGRAMS

The Metro Insurance Group successfully founded a group purchase plan in 1980 and ROMA Insurance Incorporated has coordinated a well-respected group purchase insurance program since 1979. While the Metro Group has evolved over time, essentially into a full self-insurance plan, and both the Metro Group and ROMA Insurance Incorporated are working to establish recognized reciprocal insurance exchanges involving self- insurance aspects, their operations to date have demonstrated the ability of divergent municipalities to cooperate and achieve consensus for the purpose of obtaining and supplying liability insurance coverage.

An analysis of municipal claims experience shows very few claims have been settled over the past five years for more than $1 million. The Committee recognizes that while there have been few claims in the $1 to $5 million dollar range, there is nonetheless a need for municipalities to insure themselves, their employees and their council members against the risk of this "operative" amount of liability. A large amount of premium power is currently being invested in this coverage. This aggregate premium would be reduced if municipalities joined together to purchase group insurance for this level of coverage.

(R2.2) THE COMMITTEE RECOMMENDS THAT GROUP PURCHASE PROGRAMS FOR THE ACQUISITION OF MUNICIPAL LIABILITY INSURANCE COVERAGE BE RECOGNIZED AS A VIABLE ALTERNATIVE TO CONVENTIONAL INSURANCE ARRANGEMENTS.

(R2.3) THE COMMITTEE RECOMMENDS THAT ALL MUNICIPALITIES CARRY LIABILITY INSURANCE PROTECTION OF $4 MILLION IN EXCESS OF $1 MILLION AND THAT THIS COVERAGE BE PURCHASED BY ALL MUNICIPALITIES, EXCLUDING THE METRO GROUP AND OTHER SUCH

MUNICIPALITIES THAT ESTABLISH SELF-INSURANCE PLANS UP TO $5 MILLION, FROM A GROUP PURCHASE PROGRAM ACQUIRED THROUGH THE CONVENTIONAL INSURANCE MARKET. THE COMMITTEE SUGGESTS THAT THE UPPER AND LOWER LIMITS OF THIS COVERAGE BE REVIEWED FOR THEIR APPROPRIATENESS AT THE TIME OF RENEWAL.

(R2.4) FURTHER, THE COMMITTEE RECOMMENDS THAT THIS PROVINCIAL GROUP PURCHASE PROGRAM BE ESTABLISHED BY AN ORGANIZATION, SUCH AS THE ASSOCIATION OF MUNICIPALITIES OF ONTARIO (AMO).

The Committee has been advised that several insurers would welcome the opportunity to bid on a 3-to 5-year contract for such a large scale program and is therefore confident that a relatively long term market would be available to provide this type of coverage. In addition, the Committee believes that by pooling all risks at this level, municipalities would be increasing the predictability of their overall risks and reducing the administration involved in setting hundreds of different premiums and could therefore expect the overall premium to decrease in a corresponding manner. The determination of individual municipalities' rates could be handled in a number of ways. For instance, it might be rated on a per capita or household basis. However premiums are determined, the Committee believes that it should and could be handled fairly, but above all, municipalities would make the final decision.

SELF-INSURANCE

The Committee considers self-insurance feasible and, in fact, practical and efficient on several levels. In the form of self-insured deductible levels, it made good sense to the Committee that municipalities should be carefully evaluating their capacity to retain the costs of low-valued and reasonably predictable claims. Total self-insurance, on the other

hand, while admittedly not appropriate for all municipalities, was found by the Committee to be a particularly interesting concept for municipalities arising out of the current insurance "crisis".

Deductible Levels

One might wonder why a municipality would want to even consider a deductible, given the fact that insurance decreases the economic risks of all the participants and thereby decreases the ultimate cost or risk of having to pay out each individual claim below a certain level. The Committee believes there are at least two important reasons.

First, the insurance process is not frictionless. Costs are incurred in the sale and administration of insurance. In fact, with private insurance companies, only about 65 cents of each premium dollar is expected to be used in the payment of claims. The other 35 cents of each dollar is used to pay commissions, taxes, administrative and other costs. However, for small losses, that are readily budgeted for and do not create economic insecurity, it makes little sense to "exchange dollars" with an insurer (of whatever form) if a large portion of 35 cents of every dollar will be "lost" in the exchange.

However, what represents a budgetable amount (and hence an optimal deductible) for one municipality will not hold true for another. At the moment, many of the smaller municipalities are still seeking first-dollar liability coverage, while others have liability deductibles of $50,000 or more. The decision to adopt a relatively high deductible level is especially difficult in a political environment. What might represent an optimal deductible for a private sector industry, may represent too much risk in a political setting.

The second important reason in favour of deductibles or in favour of raising small deductibles, is risk management. Again, whatever form of insurance mechanism a

municipality uses, it is essential that there be some economic incentive for loss prevention and risk management. Municipalities must have an incentive to decrease both claim frequency and severity (i.e. number of claims and average cost per claim). There should also be an economic incentive for the timely and inexpensive reporting and handling of claims. Without significant deductibles, there is little chance for prudent risk management to be rewarded.

The data available to the Committee indicated that, currently, about 80 per cent of municipal claims are less than $2,500 in cost, 13 per cent are between $2,500 and $7,500 and 2.0 per cent are between $7,500 and $10,000. For the remaining 5 per cent of claims in excess of $10,000, a smooth curve can be used to describe the probabilities at various levels.

Table 1, following, estimates the total amount of deductible costs that a municipality might experience, based on its anticipated number of claims per year. Table 2 provides a very general indication of the average claim-frequency experience of these different types of municipalities, based on the 1981-85 data analyzed. It is essential to note, however, that the breakdown of the claims frequency into municipal types does not reflect the high degree of disparity between the service levels, size and risks of municipalities within each group. Furthermore, municipalities within Metropolitan Toronto were not included in the determination of this table. As a result, the averages provided are truly averages and should, therefore, be used strictly as a guideline. Municipalities of particular types have different expected claim frequencies, due to differences in size and other characteristics.

When used in conjunction, Tables 1 and 2 will provide an approximation of the reserve requirements of a given deductible level. As the "true probability" may be somewhat lower than estimated, due to the additional uncertainty in the future insurance environment, it would be prudent to consider a 99 per cent level rather than a 90 per cent level.

An example will best illustrate the use of these tables. Consider a municipality expecting 20 claims per year. With a deductible level of $50,000 per claim, it should budget for minimum costs of $40,958 to cover the cost of deductibles. However, to absorb the shock of possible deductible costs in excess of $40,958, it should establish a contingency reserve of an additional $94,042 (totalling $135,000), to ensure, with 99 per cent probability, that additional funds will not be required to cover deductible costs for the year. The Committee stresses that reserves estabished to fund deductibles, or self-insurance, must be restricted to that specific purpose. Under no circumstances should these reserves be utilized for other municipal expenditures. In addition, the Committee suggests that councils resist the pressure to pay what may appear to be nuisance claims but, in fact, are claims that should be fought on the basis of principle and precedent.

RESERVE REQUIREMENTS FOR VARIOUS DEDUCTIBLES — **Table 1**

	$5,000	$10,000	$20,000	$50,000	$100,000	$200,000
2 Expected Claims:						
Expected Costs	1,959	2,654	3,334	4,096	4,578	4,992
90% Cushion	5,000	7,500	10,000	10,000	10,000	10,000
95% Cushion	7,500	10,000	17,500	20,000	20,000	20,000
99% Cushion	10,000	20,000	25,000	50,000	75,000	75,000
10 Expected Claims:						
Expected Costs	9,794	13,270	16,672	20,479	22,891	24,960
90% Cushion	17,500	25,000	35,000	50,000	55,000	55,000
95% Cushion	20,000	30,000	45,000	65,000	90,000	90,000
99% Cushion	27,500	40,000	60,000	90,000	130,000	210,000
20 Expected Claims:						
Expected Costs	19,587	26,540	33,344	40,958	45,782	49,920
90% Cushion	30,000	45,000	60,000	80,000	105,000	105,000
95% Cushion	35,000	50,000	70,000	100,000	130,000	165,000
99% Cushion	45,000	65,000	90,000	135,000	180,000	255,000
50 Expected Claims:						
Expected Costs	48,968	66,350	83,361	102,394	114,456	124,800
90% Cushion	67,500	85,000	125,000	165,000	200,000	250,000
95% Cushion	75,000	105,000	140,000	190,000	235,000	295,000
99% Cushion	90,000	125,000	165,000	235,000	305,000	405,000

AVERAGE NUMBER OF CLAIMS BY MUNICIPALITY **Table 2**

	1981	1982	1983	1984	1985	Total
Villages	1.981	1.515	1.257	1.621	1.135	1.473
Townships	2.014	2.009	1.496	1.433	1.773	1.721
Towns	11.390	12.150	6.474	7.125	8.424	8.644
Counties	9.000	13.330	9.571	10.430	14.000	11.270
Regions	26.500	30.170	22.130	20.750	51.380	30.880
Cities	24.380	21.350	20.900	35.430	35.310	27.430
Total	5.100	5.583	4.031	5.046	6.251	5.181

It should also be noted that, once a reserve has been established, it is unlikely that the entire amount will be utilized each year. In other words, self-insured deductibles necessitate a one-time start-up cost that would likely only require topping-up each year and to which investment interest would accrue. In other words, reserves for a self-insurance fund could become partially or wholly self-financed.

(R2.5) THE COMMITTEE RECOMMENDS THAT MUNICIPAL COUNCILS AND STAFF MAKE A CONCERTED EFFORT TO ASSESS THE DEGREE OF RISK THAT THE MUNICIPAL CORPORATION IS ABLE TO BEAR FINANCIALLY AND CONSIDER THE BENEFITS OF SELF-INSURING THE LARGELY PREDICTABLE NUISANCE CATEGORY OF CLAIMS BY INCREASING GENERAL LIABILITY INSURANCE DEDUCTIBLES AND ESTABLISHING SUFFICIENT RESERVES TO COVER THESE COSTS.

Total Self-Insurance

The Committee was interested to learn, as many of the readers of this report will no doubt be, that not all municipalities in Canada or the United States purchase insurance coverage. In some instances, restricted market conditions prohibit it, and in others, it is by conscious

choice. The City of Montreal is an example of a Canadian municipality which has chosen to entirely self-insure (except for its automobile fleet which comes under the Quebec no fault system) and has done so for decades. It has been the experience of Montreal that it is more cost effective to reserve for future claims than to pay insurance premiums. Certainly a substantial savings on premiums could easily outweigh any large claims expenses and, in addition, the substantial investment income earned on reserves would further enhance the cost savings.

The City's charter provides the authority to create and maintain a self-insurance contingency fund; although, the fund must also provide for other payments related to such items as tax protests. This fund is financed by an annual contribution of 1.5 per cent of the City's budget, which amounts to approximately $20 million per year. Claims are handled by Montreal's legal department and over the last several years, have, in total, averaged only about $1.5 million per year. The Committee feels that, in this instance, and for many urban municipalities in Ontario, self-insurance may be eminently sensible, given the size of their tax bases and the relatively painless recovery of any shortfalls through the large property tax base. While reserves would likely cover the major portion, if not all of an unusually high frequency of claims in a given year, even several million dollars could be collected, as a negligible and far from burdensome amount, on a per household basis, on any particular year's property tax bill. The Committee believes that there are a number of large urban municipalities in the province that have sufficient size and economic support to completely self-insure, if they so desire, particularly, if a group program for $4 million in excess of $1 million is in place.

(R2.6) THE COMMITTEE RECOMMENDS THAT VERY LARGE MUNICIPALITIES, SUCH AS METROPOLITAN TORONTO, ITS AREA MUNICIPALITIES, AND OTHER MAJOR URBAN CENTRES, CLOSELY EXAMINE TOTAL SELF-INSURANCE AS AN ALTERNATIVE TO CONVENTIONAL

INSURANCE. IN ADDITION, RECIPROCAL INSURANCE EXCHANGES WITH SUFFICIENT FINANCIAL CAPACITY SHOULD CAREFULLY EVALUATE A TOTAL SELF-INSURANCE PROGRAM THAT WOULD ELIMINATE THE NEED TO SEEK EXPENSIVE REINSURANCE WHICH IS CURRENTLY DIFFICULT TO OBTAIN.

It is important to note, however, that, while municipalities currently appear to have authority to self-insure the corporation's risk of liability, the legislation should expressly enable municipalities to self-insure the liability of its employees, council members and those of local boards.

(R2.7) THE COMMITTEE RECOMMENDS THAT THE MINISTRY OF MUNICIPAL AFFAIRS REVIEW AND, IF NECESSARY, AMEND ITS LEGISLATION TO ENSURE THAT IT PROVIDES CLEAR AUTHORITY FOR A MUNICIPALITY TO SELF-INSURE THE CORPORATION'S RISK OF LIABILITY, AND THE LIABILITY OF ITS EMPLOYEES, COUNCILLORS, LOCAL BOARD MEMBERS AND EMPLOYEES, INCLUDING ANY POWERS NECESSARY AND INCIDENTAL TO THE SAME.

RECIPROCAL INSURANCE EXCHANGES

The Concept

The concept of a reciprocal insurance exchange has been in existence for many years and is, perhaps, most easily understood as a pooling arrangement. In essence, a reciprocal is a venture in which a group of similar organizations with common activities and risks contract with each other to spread their collective losses by levying an amount against each member sufficient to cover these losses in the same way that an insurance company would charge

premiums against its policyholders. A reciprocal may provide insurance coverage through a total self-insurance program or it may combine a level of self-insurance with the purchase of conventional insurance, or reinsurance, at a group rate, to cover the other levels of risk it wishes to protect.

Some confusion has been expressed as to what risks would be covered in a municipal reciprocal insurance exchange; in particular, whether local boards and commissions could be included or would be required to arrange their own insurance coverage. The Committee believes that any municipal reciprocal could, and likely would, include coverage for local boards and commissions.

Provisions to establish reciprocals have existed in the Insurance Act (Ontario) for decades. However, very few have been established; presumably, because it was relatively easy to obtain conventional insurance at a reasonable price and, by virtue of its nature, the concept was most suitable for only a limited number of insurable groups.

As a result of the search for methods to alleviate the difficulties experienced in 1985, and early 1986, by publicly supported organizations attempting to renew general liability insurance policies, the notion of reciprocal insurance exchanges resurfaced as a potential alternative to conventional insurance for publicly supported organizations.

The concept was brought to the Committee's attention through several sources and has been actively supported by various public and private sector officials as an appropriate long-term solution to the cost and coverage problems of publicly supported organizations. Its proponents believe that reciprocal insurance exchanges have the capacity, over time, to provide a secure source of coverage at considerable cost-savings compared to conventional insurance companies. Both school boards and municipalities were considered by these

supporters as exceedingly suitable candidates with a high degree of potential to function successfully under such an arrangement.

The potential success of joining forces, at least for larger municipalities, has been established by the Metro Insurance Group, comprised of all but two of Metropolitan Toronto's area municipalities, which successfully founded a group purchase plan, in 1980, that has since evolved essentially into a full self-insurance program (except for the purchase of $5 million coverage in excess of $5 million). ROMA Insurance Incorporated, comprised of about 260 municipalities with populations under 25,000, has also coordinated a well-respected group purchase insurance program, since 1979. While this is not a reciprocal insurance exchange, its operation has further demonstrated the ability of divergent municipalities to cooperate and achieve consensus for the purpose of obtaining insurance coverage. In addition, the Association of Municipal Electrical Utilities currently operates a reciprocal insurance exchange. In other words, the reciprocal concept is currently functioning.

Evaluating the Concept

Lacking any hard data or facts, the Committee recommended in its preliminary report that a study be conducted to determine whether there were viable alternatives to the existing insurance market for all municipalities in the province.

While the Committee acknowledged in its preliminary report, the involvement of a number of municipalities in unconventional group arrangements, the majority of municipalities in the province continued to utilize conventional insurance broker/company arrangements. The question therefore remained: was conventional general liability insurance providing a cost-effective service and could reciprocal exchanges deliver the significant cost savings

and improved coverage that was claimed without jeopardizing the fiscal viability of municipalities?

It was determined that, given the municipal general liability insurance experience of the period, 1981 to 1985, a reciprocal insurance exchange would not have been to the economic advantage of municipalities in Ontario based on claim costs during that period, even before expenses. This is not to say that a reciprocal could not have operated successfully but simply that the claim costs over this period had to be paid, regardless of the mechanism through which the coverage was obtained.

Conventional insurers have sustained significant losses by underestimating, and thus undercharging, for the frequency and size of claims over this period. The current premiums now include far greater forecasting factors for the current uncertainties of the market and municipal risks generally. Just as one would expect one's car insurance to increase for several years following an automobile accident, so too have general liability premiums increased overall, after several years of particularly poor claims experience.

Under a reciprocal, municipalities would have been subject to an identical high-frequency claims experience and would have been forced to incur identical costs for the increased amounts of awards, as conventional insurers were. During the period, 1981 to 1985, municipalities in general, were undercharged for their general liability insurance coverage.

In the time period following the Committee's preliminary report, both the Metro Insurance Group and ROMA Insurance Incorporated have considered establishing themselves as formal and recognized reciprocal insurance exchanges under the Insurance Act. At the time of writing, approximately 80 per cent of the 160 school boards in Ontario will be operating a recognized reciprocal insurance exchange. The Committee, therefore, recognizes that a good deal of interest and support currently exists for reciprocal exchanges and that it

appears inevitable that one or more additional reciprocal insurance exchanges will be operating to service publicly supported organizations in 1987.

However, the Committee wishes to make clear that the considerations involved in establishing a reciprocal for school boards differ significantly from those for municipalities. As an example, school boards in Ontario generally provide similar services. Therefore, the risks inherent in operating a school board are basically the same throughout the province. Indeed, the Ministry of Education is legislatively committed to the provision of a standard level of education at an equal cost across the province. Available statistics show school boards also tend to have very few claims per year (average of less than two per year per board) and that individual claims have generally been of a very low dollar value, since 1981.

On the other hand, municipalities are far more diverse in the services they provide and, hence, claims history. The heterogeneity of municipalities makes their risks difficult to typify. Nor are there standards for the type, extent, potential or frequency of municipal risks in general, as municipalities differ significantly in their size, structure and geographical nature and further, bear diverse degrees of authority and responsibility for their services and facilities. Perhaps most importantly, while funded in part by the Province, municipalities are distinct and individual entities that function within widely varying degrees of financial capacity. Because municipalities do not share the same low-frequency level for higher dollar-value claims as school boards, they are far more reticent to share their individual risks with such a divergent group of organizations. Numerous unsettled claims are pending against municipalities for damages in excess of $1 million and several large awards and settlements which have been made over the last few years that will serve as benchmarks for future settlements are further impediments in convincing municipalities that reciprocals are the solution to this insurance "crisis".

These differences make municipalities a far more complex group of organizations to coordinate into a large-scale reciprocal insurance arrangement.

(R2.8) THE COMMITTEE RECOMMENDS THAT RECIPROCAL INSURANCE EXCHANGES BE RECOGNIZED AS A VIABLE ALTERNATIVE FOR THOSE MUNICIPALITIES WHICH CHOOSE NOT TO CONTINUE WITH CONVENTIONAL INSURANCE SERVICES.

(R2.9) THE COMMITTEE RECOGNIZES THAT NOT ALL MUNICIPALITIES MAY VIEW A RECIPROCAL INSURANCE EXCHANGE AS AN APPROPRIATE INSURANCE MECHANISM FOR THEIR NEEDS AND RECOMMENDS THAT PARTICIPATION BE VOLUNTARY.

The Committee believes the coexistence of reciprocal insurance exchanges and conventional insurance services to be a positive step to encouraging the competitive nature of the insurance market. The Committee does not envisage any clear advantages to reciprocal insurance exchanges being solely administered by the Province or another publicly funded organization and believes that the private sector could also efficiently establish and administer reciprocal insurance exchanges for various public bodies.

The Benefits

The Committee acknowledges that significant benefits could be realized by member municipalities within a reciprocal.

- A reciprocal is a non-profit organization and, therefore, premium levels would not incorporate a profit motive.

- All surplus funds, reserve funds, and the investment income realized on reserves would be the sole property of the members, to be credited, in a manner appropriate to the circumstances, to the members.

Given the investment success, independent status, and existing expertise of the Ontario Municipal Employees Retirement Savings (OMERS) Plan,

(R2.10) THE COMMITTEE RECOMMENDS THAT ANY MUNICIPAL RECIPROCAL INSURANCE EXCHANGE CONSIDER UTILIZING THE EXISTING EXPERTISE OF THE ONTARIO MUNICIPAL EMPLOYEES RETIREMENT SAVINGS (OMERS) PLAN TO ADMINISTER THE INVESTMENT OF RESERVE FUNDS.

- No commissions to agents or brokers would be due on the premiums paid to the reciprocal.

While this statement is true, it must also be recognized that agents carry out many activities beyond pure sales. These services will still have to be borne by the reciprocal and, therefore, a portion of this saving will not be realized.

- It would allow member municipalities to have the flexibility to design insurance coverage to serve their needs, thus avoiding unnecessary exclusions.

- Member municipalities would also have access to the financial status of the reciprocal. Existing claims and reserves in aggregate would also be common knowledge. Full disclosure of this information would provide municipalities with information to forecast their own expenses and the opportunity to be certain that premiums accurately reflected claims experience.

However, if the Province acts on the recommendation of this Committee to impose a mandatory and standard system of reporting to the Superintendent of Insurance, similar to that which now exists for automobile insurers, this information will also be available from conventional insurance companies.

Despite these advantages for municipalities, the Committee cautions that there are also drawbacks and disadvantages that must be carefully considered by a municipality contemplating sharing its risks with other municipalities.

The Caveats

Before setting out the caveats identified by the Committee, a brief discussion is required on the much-touted cost savings to be realized by reciprocal exchanges.

If reciprocals were the definitive answer to reducing and stabilizing municipal liability insurance costs, the Committee reasoned, one would expect that, under a reciprocal exchange, premiums would drop significantly, in excess of the profit, commission and any administrative efficiency costs provided for in conventional insurance premiums. Although it is not possible to compare the coverage of existing policies to the exact details of that which will be offered, the preliminary information made available to the Committee suggests that such large savings may not materialize, at least at the outset, in a reciprocal exchange.

The reciprocal that is being developed for school boards anticipates members would be assessed a levy ranging between 75 per cent of a board's 1986 premium, for those with no previous claims, up to a maximum of 95 per cent of their 1986 premium, for those with poorer claims histories. In addition, ROMA Insurance Incorporated, which is attempting to establish a municipal reciprocal insurance exchange for January, 1987, is anticipating a per

capita levy equivalent to 70 to 90 per cent of a joining municipality's 1986 liability insurance premium.

In essence, it is the Committee's determination that, had the premium increases experienced over the last year-and-a-half been totally unwarranted and unreflective of municipalities and school boards' actual claims histories, in aggregate, the entry levies for reciprocals would be significantly lower than those mentioned above. At the very least, one would expect them to reflect the lack of profit margins, broker/agent commissions and the administrative costs of conventional insurance companies, which have been variously represented to the Committee at 30 to 45 per cent of premiums. The Committee recognizes that these entry levies may include a projection for savings over the intermediate term and a capitalization factor for future claims.

However, the Committee believes that while in the short run the efficiencies of running a reciprocal insurance exchange compared to a conventional insurance company might prove elusive, if it were run over a long period of time with all of the disciplines of a private insurer (including full and proper reserving, setting up of contingency reserves, the use of deductibles and/or coinsurance, plus maximization of risk-management principles), then it seems logical to assume that some economies of scale and monopoly would accrue.

The Committee offers several caveats and cautions which municipalities should closely examine before committing themselves to a reciprocal insurance exchange.

- The annual charge would not, in fact, be a premium but would rather be a levy. While the reciprocal may, indeed, be building reserves with excess "premiums", members could be assessed for additional money if losses were greater than anticipated.

While it is true that any surplus would belong to the members and might eventually be returned or credited to them, it is also true that any shortfall must be recovered from the members.

A conventional insurance company would be required to fund any shortfall out of its own resources and would have no immediate recourse to the insured, save increased premiums for several years. It has been pointed out to the Committee that such shortfalls could, for the most part, be foreseen prior to the incurring of the actual cost and therefore, pre-budgeted or at the very least, could be recouped from the members over several years, just as conventional insurance companies would. The difference would be that the members would be absolutely certain that they were subsidizing claims incurred by fellow municipalities, not international claims or claims related to other sectors of the market. In this respect, the philosophy of a reciprocal exchange appears to be a particularly self-respecting and responsible one, especially if financial disincentives and penalties were in place that recognized the "worst customers".

- Participation in a reciprocal insurance exchange would have a long-tail effect.

Regardless of the length of commitment, i.e. one, three or five years, members would be responsible for the costs of ali claims made during their membership. Some claims, particularly the severe bodily-injury type, can take in excess of eight years to settle. Should the reserves for these claims be insufficient, the members of the reciprocal in the year in which the claim occurred, not necessarily the same members at the time a claim is settled, would have to make up the difference. It is, therefore, unlikely that a municipality will know the full extent of its dollar commitment, for any particular year of membership, for several years hence.

Further, a recent decision of the Ontario Court of Appeal lengthens the time within which minors, mental defectives, mental incompetents and persons of unsound mind may commence certain actions. As a result, the exposure of municipalities and many other defendants has been increased and the climate of uncertainty for municipal insurers and reinsurers, including reciprocals, has been further exacerbated. This may be of particular concern to school boards in this province, as many, if not most, of the claims against them are brought by, or on behalf of, plaintiffs who are minors at the date the cause of action/injury arises. See Chapter Three for a detailed discussion of this decision and increasing tort liability.

- Although it is often touted as an advantage that there are no capital and surplus requirements for reciprocals,

(R2.11) THE COMMITTEE RECOMMENDS THAT NO RECIPROCAL INSURANCE EXCHANGE BE ESTABLISHED WITHOUT AN INITIAL CAPITALIZATION, SO AS TO ENSURE THAT SURPLUS FUNDS WOULD BE AVAILABLE TO SMOOTH UNANTICIPATED CLAIMS EXPERIENCE.

Sudden jumps in cash flow requirements in years of heavy claims would be difficult to explain at the municipal level and would not be expedient politically. Initial capitalization would reduce the likelihood of this occurring. In addition, investment income earned on such funds would ultimately decrease total costs. Further in this regard, it should be obvious that investment income can be earned only if the reciprocal is initially capitalized and always carries assets to cover full and adequate reserve estimates. A pay-as-you-go reciprocal cannot claim the advantages of earning investment income.

- A reciprocal for municipalities would necessitate the pooling of highly divergent risk-bearing organizations, as discussed earlier.

The function and responsibilities of municipalities vary so significantly that it would be difficult for a small municipality that does not provide sewer, water, transit, police or recreational services to see any immediate advantage to sharing its rather minor risks with those of a municipality providing all of these services with the high risk of liability exposures attendant to them. While this is clearly a disadvantage, it is one to which the proponents of reciprocals have several solutions. It may be overcome by building the appropriate factors into the levy structure which take these differences into account and/or through an annual actuarial determination of an appropriate levy for each municipality.

- There must be a minimum number of members, as below a certain level, the reciprocal would not be large enough to offer sound insurance. Certain minimum membership is necessary for proper underwriting and to comply with the current Insurance Act (Ontario).

This raises a real concern for many municipalities. How many reciprocal insurance exchanges would provide the most effective and efficient protection to municipalities? The Committee has been advised that a single reciprocal would best serve Ontario municipalities, and, philosophically, the Committee must agree that a reciprocal's success would hinge on the Law of Large Numbers.

(R2.12) THE COMMITTEE RECOMMENDS THAT A MUNICIPALITY'S CLAIMS HISTORY, RISK EXPOSURE AND RISK-MANAGEMENT LEVELS BE MADE CLEARLY APPARENT IN ITS LEVY, TO AVOID SOME OF THE DIFFICULTIES OF SELLING THE CONCEPT OF A SINGLE MUNICIPAL RECIPROCAL INSURANCE EXCHANGE TO MUNICIPAL COUNCILS.

- The time commitment required by the members of a reciprocal exchange has concerned the Committee in several respects.

Would municipalities be wise to insist on a long-term commitment from the point of view of financial stability? The inherent long-term commitment involved in claims that take many years to settle has been discussed above. However, if municipalities were asked to make a multi-year commitment to the reciprocal, consideration should be given to the inability of a municipal council to make a financial commitment extending beyond its term of office.

The school boards' reciprocal will require a five-year commitment and the publication by the Ministry of Financial Institutions, "Reciprocal Insurance Exchanges", suggested that a commitment of up to three years by participants is required in order to gain true cost-savings through a reciprocal. The actuarial study commissioned by the Committee suggested that the economic advantage of a reciprocal would likely be elusive in the short run. However, a reciprocal, run over a long period of time, with all the disciplines of a private insurer should logically accrue some economies of scale.

Subsection 64(1) of the Ontario Municipal Board Act prohibits municipalities from authorizing or exercising any of their powers to proceed with or provide any money for any undertaking, the cost or any part of which is to be raised in subsequent years, until the approval of the Ontario Municipal Board (OMB) has been obtained. However, subsection 64(3) of that Act provides that subsection 64(1) does not apply to the incurring of debt payable within the term for which the council was elected. The Municipal Act, subsection 149(2), lists numerous other undertakings which do not require OMB approval. Contracts of insurance within a municipal reciprocal exchange are not excepted.

Accordingly, under the current legislation, if a municipality entering into a reciprocal insurance exchange wishes to commit itself to the exchange for a period longer than the term of council, OMB approval is required.

It would be a prohibitively time-consuming task for the OMB to conduct financial analyses of a large number of municipalities to assess the burden of a recurring administrative expenditure, that at the outset will likely be somewhat lower than the current cost and for which a future cost is impossible to predict. The OMB would not be in a position to pass judgment on the success of a reciprocal exchange nor to predict the future monies which a council would ultimately be committing. The Committee feels it would therefore be an undue burden to ask the OMB to review municipal commitments to purchase insurance coverage through a reciprocal.

(R2.13) THE COMMITTEE RECOMMENDS THAT SUBSECTION 149(2) OF THE MUNICIPAL ACT, WHICH LISTS NUMEROUS OTHER UNDERTAKINGS THAT DO NOT REQUIRE THE APPROVAL OF THE ONTARIO MUNICIPAL BOARD (OMB), BE AMENDED TO INCLUDE A REFERENCE TO AGREEMENTS FOR THE PROVISION OF INSURANCE THROUGH A RECIPROCAL INSURANCE EXCHANGE.

- A further problem, is that the current legislation is not express in authorizing municipalities to enter into and form reciprocal insurance exchanges, although authority exists to self-insure against the risks of the corporation.

In addition to the earlier discussion and recommendations regarding self-insurance, section 165 of the Municipal Act, read in conjunction with section 121, would appear to provide municipalities with the authority to pool their funds in a joint reserve fund for such purposes, provided the councils of each participating municipality agree that subsection

165(4) may not be utilized to expend the funds for any purposes except as agreed upon by all participants.

The legislation is, in many respects, a matter of interpretation, and although good arguments could be made that municipalities have the authority to join or form reciprocals, it is not expressly stated in the current legislation.

The Committee believes that all municipalities in the province should have the clear choice of selecting a reciprocal or other alternative to conventional private sector insurance, if they so desire. The lack of, or perceived lack of, enabling legislation should not be a deterrent in their decision to take this step.

(R2.14) THE COMMITTEE RECOMMENDS THAT THE MINISTRY OF MUNICIPAL AFFAIRS ENACT LEGISLATIVE AMENDMENTS TO PROVIDE CLEAR AUTHORITY TO ENABLE ALL MUNICIPALITIES TO JOIN AND FORM RECIPROCAL INSURANCE EXCHANGES, INCLUDING ANY POWERS NECESSARY AND INCIDENTAL TO THE SAME.

- It would appear at this time that reciprocals would be subject to the standard 3 per cent premium tax, an assessment by the Facility Association, and subrogation payments related to OHIP.

The Committee questions the rationale for subjecting municipal reciprocal insurance exchanges to the 3 per cent premium tax. The Slater Task Force recommended that the Superintendent of Insurance request a ruling from Revenue Canada on the taxation of reciprocal exchanges and make available a commentary on the matter. Subsequent to that report, the Minister of Municipal Affairs wrote to the Minister of National Revenue to request clarification of several issues relating to the federal income taxation of municipally

established reciprocal insurance exchanges. The Honourable Elmer MacKay responded on October 20, 1986 with the following comments:

> "Provided that the capital of such an association [formed to operate a non-profit exchange providing insurance coverage solely for municipalities and their local boards and commissions] is owned by Canadian municipalities and provided that there is no right under a contract whereby any person other than a Canadian municipality or Her Majesty in right of Canada or a province could, in equity or otherwise either immediately or in the future, acquire the capital of the association, then no tax will be payable upon the taxable income of such an association. Should the exchange be operated as a partnership or joint venture arrangement, then any income earned would be attributed back to each municipality and thus exempted from taxation."

Municipal reserves, for any purpose including self-insured deductibles, are not taxable under current legislation. The funds contributed to a reciprocal exchange are, in essence, municipal "reserves" for liability claims. The Federal Government has clearly stated that the taxable income, i.e. interest earned on reserves, is not taxable. In addition, the Committee has learned that "pooled" municipal funds, such as those utilized by the Metro Insurance Group, have not been subject to the 3 per cent premium tax. In view of the fact that the Province has promoted reciprocal insurance exchanges for public bodies, **the Committee believes that the Province should recognize the funds set aside by a public reciprocal insurance exchange as a municipal reserve fund and, as such, not subject it to the 3 per cent premium tax.**

(R2.15) THE COMMITTEE RECOMMENDS THAT THE 3 PER CENT PREMIUM TAX BE WAIVED FOR RECIPROCAL INSURANCE EXCHANGES ESTABLISHED BY PUBLIC BODIES.

Currently, insurance companies that offer automobile coverage must contribute to the funding of the Facility Association, which provides last-resort coverage for hard-to-insure drivers under the legislative direction of the Province. The Association is funded on a pro-rata basis of the participants' share of the total market. It operates much like a reciprocal, in that, as the sole source of funds, participants assume responsibility for all of

the Association's costs and are similarly responsible for covering costs arising out of losses. However, the share, and therefore the payments required of a municipal reciprocal insurance exchange that provides automobile coverage, are likely to be very low. In addition, a municipal reciprocal may decide to utilize the Association to insure its high risk and environmental hazard vehicles, such as waste disposal trucks. A reciprocal would be liable for the potential disaster level risks of these vehicles and may well wish to exclude them from the reciprocal's coverage. **The Committee believes that reciprocal insurance exchanges for public bodies should be required to contribute to the Facility Association in the same manner as a conventional insurance company.**

A discussion of the Committee's position on the subrogation of OHIP-related medical costs can be found in Chapter Three. Suffice it to say at this point, that **the Committee believes that subrogating medical costs universally is desirable and that this cost should be a component of any reciprocal insurance exchange levy.**

Conclusions

The Committee fully recognizes that at least one formal municipal reciprocal insurance exchange may be in operation by the time this report is released and, therefore, extends its hope that this reciprocal successfully stands the test of time. **For those municipalities which believe a reciprocal insurance exchange will meet their needs, the Committee feels compelled to caution such municipalities to carefully review the benefits and caveats, as they pertain to their individual situation, and to fully understand the obligation they are undertaking.**

Despite the various concerns the Committee has voiced to this point, it believes that the ultimate success of reciprocals may hinge on their administration and how appropriate levy shares, or premiums, are eventually determined. It will, therefore, be incumbent on the

directors of a publicly operated reciprocal to ensure the integrity of the levy determination process. A municipal reciprocal insurance exchange will be significantly different from any previous municipal undertaking and will require qualified professional direction.

Whereas the Committee believes that the administration of a municipal insurance exchange will be crucial to its success,

(R2.16) THE COMMITTEE RECOMMENDS THAT THE BOARD OF DIRECTORS OF A MUNICIPAL RECIPROCAL INSURANCE EXCHANGE BE CAREFULLY SELECTED AND BALANCED TO PROVIDE SIGNIFICANT PROFESSIONAL REPRESENTATION FOR ALL ASPECTS OF THE UNDERTAKING.

CAPTIVE INSURANCE COMPANIES

It was determined by the Committee that given the current Canadian tax laws which penalize domestic captives and the remote and, therefore, uncertain nature of the regulation of offshore captive insurance companies, they were not a viable insurance mechanism for Ontario municipalities to consider.

IN SUMMARY

Over the course of this chapter the Committee has made several recommendations which will now be brought together to better illustrate the full proposal. After very careful consideration, the Committee has determined that no one insurance mechanism can provide the ultimate or perfect product to service the liability insurance needs of municipalities in Ontario and address the concerns and pressures of the international insurance market. Municipalities should not expect any arrangement to return current liability insurance premiums to their 1980 level. The environment for this coverage has changed, such that it

is unlikely that rates will decline and if they do, municipalities must realistically view this as a temporary adjustment.

(R2.17)

a) **THE COMMITTEE RECOMMENDS THAT MUNICIPALITIES BE INDIVIDUALLY RESPONSIBLE FOR SECURING THE FIRST $1 MILLION OF LIABILITY INSURANCE COVERAGE FROM ANY OF THE CONVENTIONAL OR ALTERNATIVE SOURCES DISCUSSED IN THIS REPORT, WHICH THEY DEEM APPROPRIATE TO SERVICE THEIR NEEDS.**

b) **THE COMMITTEE RECOMMENDS THAT GROUP PURCHASE PROGRAMS FOR THE ACQUISITION OF MUNICIPAL LIABILITY INSURANCE COVERAGE BE RECOGNIZED AS A VIABLE ALTERNATIVE TO CONVENTIONAL INSURANCE ARRANGEMENTS (R2.2).**

THE COMMITTEE RECOMMENDS THAT ALL MUNICIPALITIES CARRY LIABILITY INSURANCE PROTECTION OF $4 MILLION IN EXCESS OF $1 MILLION AND THAT THIS COVERAGE BE PURCHASED BY ALL MUNICIPALITIES, EXCLUDING THE METRO GROUP AND OTHER SUCH MUNICIPALITIES THAT ESTABLISH SELF-INSURANCE PLANS UP TO $5 MILLION, FROM A GROUP PURCHASE PROGRAM ACQUIRED THROUGH THE CONVENTIONAL INSURANCE MARKET. THE COMMITTEE SUGGESTS THAT THE UPPER AND LOWER LIMITS OF THIS COVERAGE BE REVIEWED FOR THEIR APPROPRIATENESS AT THE TIME OF RENEWAL (R2.3).

FURTHER, THE COMMITTEE RECOMMENDS THAT THIS PROVINCIAL GROUP PURCHASE PROGRAM BE ESTABLISHED BY AN ORGANIZATION,

SUCH AS THE ASSOCIATION OF MUNICIPALITIES OF ONTARIO (AMO) (R2.4).

c) **IN ORDER TO ALLEVIATE THE CONCERN OF UNUSUALLY LARGE CLAIMS, THE COMMITTEE RECOMMENDS THAT THE MINISTRY OF MUNICIPAL AFFAIRS ESTABLISH A MUNICIPAL DISASTER LEVEL INSURANCE FUND TO PROVIDE COVERAGE FOR ANY CLAIM EXCEEDING $5 MILLION. THE COMMITTEE SUGGESTS THAT SUCH A FUND BE FINANCED THROUGH A $2 MILLION CONTRIBUTION FROM THE UNCONDITIONAL GRANTS ALLOCATION FOR EACH OF FIVE YEARS, AND BE INVESTED WITH THE ONTARIO MUNICIPAL EMPLOYEES RETIREMENT SAVINGS (OMERS) PLAN (R2.1).**

If enacted in concert, this three-part proposal would:

- encourage competition in the provision of liability insurance coverage in both the $0 to $1 million band and the $1 to $5 million band;

- eliminate uncertainty in the setting of premiums by capping municipal risks at $1 million per occurrence on individual policies and $5 million per occurrence on the group policy;

- provide assurances to municipalities, as well as conventional insurers, that municipal liability risks are quantifiable and, therefore, represent a desirable line of coverage;

- remove the fear of a disaster level claim that could seriously tax the financial capacity of a municipality;

- if not significantly reduce, at least stabilize municipal liability insurance rates; and

- leave the ultimate responsibility for decision making in the hands of the municipal sector.

While the Committee would not completely dismiss the idea of a public municipal liability scheme, it views such provincial participation as strictly a last resort to be implemented only if the private sector fails to provide service.

CHAPTER THREE - MUNICIPALITIES AND THE LAW

In the preliminary report, the Committee reviewed a number of statutes that had been identified as possible problem areas, both for insurers and insureds. A number of these statutes were earmarked as requiring immediate attention. The statutes of concern were broken down into two types:

1. those that increase municipalities' exposure to risk; and,

2. those that affect the size of the award paid out.

RESPONSE TO THE PRELIMINARY REPORT

Since the Committee delivered the preliminary report in April, it has heard from many municipalities and municipal associations, as well as the major municipal insurers, and many diverse groups and organizations that are either directly or indirectly associated with municipalities. The Committee has been pleased with their response. All those responding, without exception, embrace the Committee's recommendations for change and indeed, some go as far as to recommend further changes or clarification of the Committee's positions. The Committee's opinion that further capping was unnecessary was challenged by the Association of Municipalities of Ontario (AMO). The Committee's thoughts on AMO's position will be reviewed in detail later in this chapter.

Provincial Ministries' Support

As the body responsible for identifying the insurance problems faced by municipalities for the Slater Task Force on Insurance, the Committee felt it appropriate to survey those ministries of the Provincial Government which, in some way, deal with or share risks through joint ventures with municipalities, their boards and commissions, as clients. Their views on the existing tort system and the possibility of amending some

of the more obviously flawed statutes for their own benefit, as well as that of their clients, were solicited. While the responses received were generally cautious in their approach, the Committee was pleased to see that all respondents were open to suggestions for amendments to the existing system. Some ministries chose to identify specific areas of concern that needed attention. These suggestions will be noted at the appropriate time.

The position espoused by the Minister, who is directly responsible for changes to the justice system in Ontario, the Attorney General, the Honourable Ian Scott, in his July 24, 1986 letter to the Committee, was that he stood "ready, willing and able to implement solutions" but "...only when there is a demonstrated connection between the desired reform and the mischief sought to be cured".

It should be noted that the Slater Task Force was faced with the same lack of Ontario-based empirical data as the Advisory Committee on which to base its conclusions. This deficiency did not deter the Task Force from recommending a no-tort or modified-tort accident-compensation plan. Rather, the Task Force relied on the testimony of others, both in Ontario and abroad, as well as the application of both logic and common sense to substantiate its arguments for fundamental change. In a similar fashion, the Committee intends to advance further arguments to substantiate its belief in the need for incremental changes to the existing laws affecting the tort litigation process and other statutes affecting the level of risk exposure of Ontario's municipalities. The Committee believes that the recommended changes need to be addressed, whether or not the Province chooses to follow the course of action recommended in the Slater Report.

UNCERTAINTIES WITHIN THE TORT SYSTEM

Insurance companies determine their policy clauses and premium rates on the basis of the claims they anticipate facing. Municipalities also set their deductible levels and their coverage limits on the basis of the existing rules of the game. If the interpretation of a particular statute is altered by a court decision, the rules of the game change not only for the present and the future but also for all the unfinished games or unsettled claims of the past. What once was considered to be a hard and fast law may now be totally reversed.

In addition to the prospect of changing interpretations, "deep pocket" defendants face the possibility of being joined in an action because they have the ability to pay where others may not. If a "deep pocketed" defendant can be found to be liable for the smallest measure of blame, a plaintiff may be assured of full payment.

Besides being unfair, it is the Committee's view that the changing standards of liability and causation, coupled with the lack of predictability in the decisions of the courts, have generated a great deal of uncertainty in the insurance market and, as such, are an important contributing factor to the insurance "crisis" we are facing today.

In the last three months alone, there have been three important cases brought to the attention of the Committee where the lack of predictability of the courts has resulted in radical changes to, or opened to question, the existing law.

In the first such case, the Ontario Court of Appeal handed down its decision on **Papamonolopoulos v. The Board of Education for the City of Toronto** on August 6, 1986. In this recent ruling, the court decided that it was wrong in its decision, in 1969, regarding the case of **Philippon et al. v. Legate et al.** Thus, it effectively overruled

what appeared to be the law for almost two decades with respect to the lengths of time minors, mental defectives, mental incompetents and persons of unsound mind, have to commence certain actions. As an example of the impact of this ruling, in the case of a 10-year-old child who was involved in an accident, the limitation periods for bringing action on behalf of this minor do not commence until the child reaches 18 years of age.

This recent decision, can only serve to further exacerbate the climate of uncertainty for insurers and reinsurers with regard to the limitation periods in force and the exposures they are accepting in all liability policies.

In addition to the case just cited, there is **Streng et al. v. The Township of Winchester** which leaves the validity of all limitations currently in force open to question (see discussion under Limitations Act page 3.37).

The Committee has also been advised of a recent decision of the Ontario Court of Appeal, **Greatrex et al. v. The Township of Ennismore and the Country of Peterborough**, which involved a stop sign on a county road. Prior to this decision, it appeared that the county, being responsible for the sign, was responsible at law to ensure that the sign was maintained and visible. The Committee was advised that both the trial court and the Court of Appeal held otherwise, finding that the township, on whose land the tree was located, was liable and that the county was free of all liability. Also of significance, was the Court's finding of causation. Under similar circumstances in the past, the Ontario Court of Appeal has held that the municipality, which failed to maintain and keep visible, a sign, was negligent; but, its negligence was not a causative factor in the ensuing accident. Thus, while the municipality may have been in the wrong, it was not held to be liable. In this particular case, the trial court held the municipality's negligence to be causative, despite its recognition of at least two

other Ontario Court of Appeal decisions to the contrary. Subsequently, the Court of Appeal upheld the trial court's decision.

The Committee does not wish to belabour the point, but simply to state that, over time, the interpretation of the existing laws by the courts has continually expanded municipal liability. As well, the rate of this change appears to have significantly increased in the last few years. Municipalities and insurers are left in a state of uncertainty as to where their risk exposure will expand next.

NO-TORT AND MODIFIED-TORT ACCIDENT COMPENSATION SYSTEMS

The Slater Report builds the foundation for a fundamentally different approach to accident compensation on the argument that the tort system can no longer be expected to promote the socially optimal insurance and deterrence objectives simultaneously. It is the Slater Task Force's view that the system has lost its ability to fulfill its role as a meaningful financial deterrent to society because of the pervasiveness of insurance today. As well, they suggest that the practical problems, the inefficiencies and obstacles to the present system, are insurmountable and far outweigh the benefits of amending the legislation that governs tort. As for its ability to deliver compensation to injured parties, the tort system is described as uncertain, unpredictable, subject to long delays and incapable of providing compensation to more than one-third to one-half of all modern accident victims. The Slater Report concludes that the system for delivering compensation and deterrence must be separated. Compensation objectives could best be met through a first party no-tort accident insurance system and deterrence or fault objectives, through a refined insurance penalty-rating or premium-pricing mechanism. In short, the Slater Report suggests that the existing tort system for automobile insurance be abandoned completely, except perhaps for cases where serious and

permanent bodily injury occur and ultimately, in the opinion of Dr. Slater, that the existing tort system be totally abandoned.

Committee's Position on No-tort and Modified-Tort Options

The Committee did not consider no-tort accident compensation systems in its preliminary report. Since that time, it has reviewed a number of briefs submitted to the Minister of Financial Institutions, including those from the Advocates' Society, the Report of the NDP Caucus Committee on Insurance, the Canadian Independent Adjusters' Association and the FAIR Committee. All deal extensively with the Slater Report's recommendation to implement a no-tort auto insurance system in Ontario.

The Committee has found that there seems to be some confusion among the citizens of Ontario with regard to what the Slater Report has, in fact, proposed. It is our understanding that the Slater Report did not recommend a no-tort/no-fault compensation plan. The Report envisaged that fault would be handled through a "refined and rigorous penalty-rating or premium-pricing mechanism". This would be the financial penalty that the individual at fault would face. It should be remembered that the police authorities also determine fault under the Highway Traffic Act in the case of motor vehicle accidents and, when necessary, lay criminal charges against those held to be at fault. Although fault would still be a reality under the Slater Report's first-choice proposal, no accident victim, regardless of the seriousness and permanence of injury, would have recourse to the courts for financial losses.

The Province of Quebec currently has the only no-tort automobile personal-injury plan in Canada that completely eliminates recourse to the courts. If the provincial government finds the proposed changes too drastic to accept, the Slater Report offers an alternative that would allow victims access to the tort system, if a certain threshold

such as "serious and permanent injury" were surpassed. While this alternative offers something less than total change, both the Advocates' Society and FAIR suggest "serious impairment of bodily function" is a very subjective test and that verbal thresholds can result in manifestly unfair results because one person's definition of "serious injury" is not the same as another's. FAIR cites the problems encountered with the Michigan standard of "serious impairment of bodily function, serious disfigurement or death" as an example.

In principle, the Committee can see many benefits accruing to Ontario municipalities under a no-tort automobile accident compensation plan, as envisioned in the Slater Report. It is, after all, as a result of inherent inequities in the present tort system that municipalities face an ever-increasing exposure to risk. As examples of some of the more obvious benefits, under a no-tort automobile compensation plan, the deep-pocket syndrome and the inherent unfairness of the "joint and several" provisions of the Negligence Act in road-related accidents would disappear. Municipalities would no longer be routinely added to the list of defendants in such cases. Legal and administrative costs associated with defending against liability cases would likewise disappear.

The Committee does not agree with the point of view espoused in the FAIR Report that a no-tort automobile compensation system will necessarily lead to more careless drivers and more traffic fatalities or that coverage and benefits received will necessarily decrease under such a plan. However, all of the briefs reviewed by the Committee suggested that such an auto insurance plan would cost more than the current system of private insurance now in place. The NDP Caucus brief suggested that a publicly run no-tort plan would result in lower premiums, whereas a privately run plan would not and cites examples where the premiums charged in publicly run auto insurance programs in other provinces are lower than those currently charged in

Ontario. The Advocates' Society also questions the rationale for a plan of this nature to be administered by private insurers.

The Committee reviewed the financial performance of the three publicly run auto insurance programs in western Canada for the period, 1981 through 1985, and found that only the Saskatchewan Government Insurance Auto Fund had consistently set premiums to sustain an underwriting gain. In 1985, this program experienced its only major underwriting loss year, paying out $1.14 for every dollar collected in premiums. Both the Manitoba Public Insurance Corporation and the Insurance Corporation of British Columbia set auto premiums that resulted in underwriting losses in all five years, averaging 107.96 per cent and 115.34 per cent per year, respectively. The Committee acknowledges the fact that investment income can offset some or all of the underwriting shortfalls each year, depending on economic circumstances. However, it has focussed on the underwriting loss or gain position, merely to underscore the fact that publicly run programs could conceivably set premiums to sustain an operating loss indefinitely for various political reasons; whereas, similar privately run programs and their policy holders would not enjoy this same luxury.

While the Committee has some reservations with respect to the eventual premium costs to municipalities of implementing a no-tort automobile accident compensation program in Ontario, it agrees in principle with the Slater Report's recommendations. While the implementation of such a plan may not reduce municipal insurance-related costs, it would offer a welcomed added measure of respite and security against auto accident-related liability suits.

Provincial Government's Choice

In the Committee's opinion, the Provincial Government has some difficult choices to make in the coming months. If it chooses to reject the Slater Report's recommendation to abandon the tort system in favour of a no-tort system, then it either implicitly accepts the responsibility of improving the existing tort system or the responsibility of establishing that the existing system is performing adequately. If the Government chooses to accept the Slater Report's recommendation that a no-tort system be introduced at least for auto insurance, then implicitly, it is agreeing that the present tort system cannot be counted on to provide just settlements, either now, or in the future. The Committee recognizes that while auto liability-related cases make up the bulk of tort cases before the courts, there still remains a wide range of other tort cases that are either settled out of court, based on previous tort decisions, or are decided on the basis of tort law by a presiding judge.

The Committee can see a timing problem developing that needs to be brought to the attention of those who believe amendments to the existing statutes affecting the tort process are not only necessary but also promptly needed. The Committee understands that the Ontario Law Reform Commission (OLRC) is due to report to the Attorney General in January of 1987 on the "Contribution Among Joint Tortfeasors". Most other justice issues that were identified by this Committee, the Slater Report and many other submissions, are under study by Professor Waddams for the OLRC. Despite the Slater Report's recommendation that the OLRC's work be accelerated and the final report be made available as soon as possible, our inquiries have revealed that the Waddam's Compensation Project will not be completed until the fall of 1987. After allotting the appropriate time for consideration of the contents of the report by the public and additional time for the Provincial Government to introduce and pass the required

amendments in the legislature, a spring 1988 date appears to be the earliest opportunity to realize substantive change.

Based on this revelation, the Committee is forced to make the following statement with regard to the urgency of the need for action.

Regardless of whether the Provincial Government decides that the existing tort system should be maintained for auto-related injury cases, modifications to the laws governing the tort process require immediate attention and should be afforded a higher priority than a spring 1988 implementation date dictates.

Recommendation for a Universal Accident Compensation Plan

Realistically, the Committee views the time horizon for moving to a universal compensation plan, if ever, as a long-term project. The Slater Report likewise suggested that a universal plan "is unrealistically attainable in the short-to-medium term".

Summary

In the Committee's view, regardless of whether the Government of Ontario acts on the Slater Report's recommendations for a no-tort automobile compensation program, there remains a compelling need to address the problems of the present system. It is the Committee's purpose in the remaining portion of this chapter to discuss the various options for amendments to the existing statutes, both tort and others, and demonstrate the need for change in those areas that the Committee feels are most critical for Ontario's municipalities, their boards and commissions.

HOUSEKEEPING AMENDMENTS

The sudden emergence of this liability insurance "crisis" has caused municipal councils and staff throughout the province to take a hard look at the risks they are exposed to in their day-to-day operations. As a result, a number of legislative amendments have been identified by this Committee, the Association of Municipalities of Ontario and the Ontario Good Roads Association as being critically needed to protect municipalities from unnecessary and unwarranted exposure to risk. The Committee feels that in the case of these amendments, it would be imprudent and unnecessary for the provincial government to wait to introduce these changes until a total package of amendments arising out of the recommendations of this Committee and those of the Slater Task Force is developed. The following is a list of those amendments which the Committee feels should be passed without delay.

1. **Municipal Act**

   By way of an introduction to the changes that the Committee feels are required to the Municipal Act for municipalities to have the clear authority to undertake their insurance-related responsibilities, the reader is reminded that municipalities exist solely as a result of provincial legislation. As such, they only have the powers that have been vested in them by the express language of a statute and those which are essential to the accomplishment of the declared purposes for which they have been created. In other words, unless it is clearly stated in some statute that municipalities have a specific power of authority, they don't have it. The Committee has discovered a few instances where municipal authority with respect to insurance-related matters need clarification. Some of the proposed changes to the Municipal Act are discussed in Chapter Two, as they relate to the consideration of alternative insurance mechanisms, i.e. reciprocal exchanges and self-insurance.

I - Coverage For Volunteers Since the preliminary report, in which the Committee identified a growing need for some form of protection for volunteers in general and municipal volunteers in particular, evidence has been mounting to suggest that volunteers at all levels are becoming increasingly aware of the fact that they are potentially at risk in performing duties free of charge for various community and social services groups. Insurance companies are reducing policy coverages for groups participating in these types of activities. Most recently, groups working with the mentally and physically handicapped, with family-service groups, in old-age homes and other community-service organizations appear to be at risk of experiencing reduced coverages at the time of policy renewal.

Many participants feel the coverage being offered through the Province's insurer of the last resort, the Ontario Liability Insurers' Group, is not sufficient to allay their fears of incurring personal loss. As a result, the Committee fears there will be an exodus, both in terms of quality and quantity of volunteers to draw from in the future, if the perceived problems of adequate coverage are not addressed quickly. The Committee has learned that the Ontario Liability Insurers' Group is contemplating increasing the coverage it is currently offering to $2 million from $1 million. Time will tell whether society feels this doubling of coverage is adequate.

The Committee has found that, while many municipalities are currently including volunteers under their municipal liability insurance policies, no authority appears to exist for them to purchase this coverage from third-party insurers to cover volunteers, nor may they provide such coverage through their self-insurance plans. The exception to this grim reality is local board members as defined in the Municipal Affairs Act, who may be volunteers. This problem arises as a result of paragraph 208 (50) of the Municipal Act, which provides municipalities with

the authority to purchase liability insurance on behalf of their employees. The definition of "employee" under this paragraph requires the individual being insured to receive a salary.

However, the definition of "employee" also includes any person or class of persons designated as an employee by the Minister of Municipal Affairs. The Committee has discovered that, to date, no such designation appears to have been made. The Committee feels that this is too important an issue for the municipal sector as a whole and to the quality of life these municipal volunteers help provide in their communities, to be left unresolved until a general policy for all volunteers can be established by the Provincial Government. The Committee believes that municipalities should have the authority to provide liability insurance coverage to all those volunteers who provide a service to, or on behalf of, the municipality and has established that there are two ways of accomplishing this objective. The first requires an amendment to the Municipal Act and various regional acts to include volunteers among the persons on whose behalf municipalities may contract for insurance and enabling municipalities that self-insure to indemnify volunteers. The second requires the Minister of Municipal Affairs to designate volunteers as employees for the purposes of paragraph 208 (50) of the Municipal Act.

In the Committee's view, the second option is the best choice because it can accomplish the desired results immediately. The Minister need only formally recognize volunteers in writing as employees for this paragraph of the Act and notify all municipalities of this designation. This designation does not require a regulation within the meaning of the Regulations Act, nor filing nor publication in the Gazette, to be effective. A legislative ammendment, although equally capable of achieving the desired results and worthy of consideration for

permanent protection of volunteers, can often encounter considerable delays before enactment.

(R3.1) THE COMMITTEE RECOMMENDS THAT THE MINISTER OF MUNICIPAL AFFAIRS ACT IMMEDIATELY TO DESIGNATE THE FOLLOWING PERSONS ONLY AS "EMPLOYEES" FOR THE PURPOSES OF PARAGRAPH 208 (50) OF THE MUNICIPAL ACT:

"SUCH VOLUNTEERS AS MAY PROVIDE THEIR SERVICES ON BEHALF OF, OR DIRECTLY TO, THE MUNICIPALITY, PROVIDED THAT THE COUNCIL OF THE MUNICIPALITY HAS FIRST PASSED A BY-LAW DESIGNATING SUCH PERSONS OR CLASS OF PERSONS AS EMPLOYEES FOR THE PURPOSES OF THE MINISTER'S DESIGNATION."

II - Temporary Road Closings Amend paragraphs 43 and 44 of section 208 of the Municipal Act to allow all municipalities, including regions, the authority to delegate to a committee or municipal officer the power to temporarily close roads. As it stands now, municipal councils must pass by-laws for all temporary road closings. This requirement is unnecessarily restrictive, particularly in light of the urgent situations that can and do arise from time to time that dictate immediate action. Often, calling an emergency council meeting to deal with this single issue is neither practical nor convenient. However, under the present legislation, municipalities that do close roads temporarily in situations where calling council meetings is impossible, face the possibility of exposure to damages that would not occur otherwise.

(R3.2) THE COMMITTEE RECOMMENDS THAT PARAGRAPHS 43 AND 44 OF SECTION 208 OF THE MUNICIPAL ACT BE AMENDED TO ALLOW ALL MUNICIPALITIES, INCLUDING REGIONS, THE AUTHORITY TO DELEGATE TO A COMMITTEE OR MUNICIPAL OFFICER THE POWER TO TEMPORARILY CLOSE ROADS.

2. **Highway Traffic Act**

I - Flag Persons Amend the Highway Traffic Act so as to provide clear authority for municipal employees or persons employed under contract with a municipality to direct traffic on municipal highways according to their discretion, during construction or maintenance activities on such highways, notwithstanding the provisions of the Act or any by-law to the contrary, and requiring drivers of any vehicle to obey such direction. Currently, there does not appear to be any clear authority for municipal employees or those under contract with a municipality to direct traffic when road maintenance or construction is undertaken. In practice, they do direct traffic in these instances and it is obviously necessary to do so. Both school crossing guards and police have been given similar authority under the Highway Traffic Act. Consideration should also be given to the future use of robots for these duties. It is the Committee's understanding that some jurisdictions in Quebec have been using robots successfully for traffic direction for some time now. It may only be a matter of time before the introduction of robots for these duties in Ontario is tested.

II - Maintenance Vehicles Amend section 121 of the Highway Traffic Act so as to provide clear authority for the drivers of snow-clearing vehicles, road-grading

machines or vehicles and other road-building and maintenance machines or vehicles operated by or on behalf of a municipality having jurisdiction over a highway and engaged in snow clearing, construction, marking or maintenance activities, to make right and left turns from lanes other than as currently provided, so long as the driver has ascertained that such movement can be made in safety, and to amend such other provisions of the Highway Traffic Act to provide clear authority for these vehicles during such activities, to be driven to the left of the centre of a municipal roadway or to the right of the highway's right edge so long as the driver has ascertained that such movement can be made in safety.

3. **Occupational Health and Safety Act**

Amend the Occupational Health and Safety Act to ensure that incidental and usual works performed by a municipality, such as the preparation of pre-construction drawings showing the location of municipal and other services, inspections to ensure compliance with provincial and municipal laws and standards and the terms of any contract, do not bring municipalities within the definition of a "constructor" where the project or work is undertaken by a person under contract to a municipality and who is not a municipal employee, unless the municipality undertakes through its employees to complete all or a substantial part of the project.

(R3.3) THE COMMITTEE RECOMMENDS THAT THE MINISTRIES OF MUNICIPAL AFFAIRS, TRANSPORTATION AND COMMUNICATIONS, AND LABOUR, TOGETHER WITH REPRESENTATIVES OF THE ONTARIO GOOD ROADS ASSOCIATION AND THE ASSOCIATION OF MUNICIPALITIES OF ONTARIO (AMO) CONDUCT AN

IMMEDIATE REVIEW OF THE IMPACT THAT THE HIGHWAY TRAFFIC AND OCCUPATIONAL HEALTH AND SAFETY ACTS HAVE ON THE CONSTRUCTION, MAINTENANCE AND REPAIR OF MUNICIPAL ROADS AND PROPERTY, SO THAT THE MINISTERS RESPONSIBLE MAY PROCEED AS QUICKLY AS POSSIBLE WITH THE IMPORTANT AMENDMENTS REFERRED TO.

The Committee recognizes that the Province has a continuing responsibility to monitor the performance of its existing laws and a commitment to implement changes to them when necessary to ensure the desired results are achieved. During this process, many possible impacts are invariably considered.

By their very nature, municipalities are involved, either directly or indirectly, in the provision of a wider range of services than any other corporation in the province, save the Province itself. Consequently, unless otherwise considered, amendments to most provincial acts could, unintentionally, alter the municipal sector's exposure to risk. The Committee is aware that the Ministry of Municipal Affairs reviews all proposed legislative changes on behalf of the municipal sector and has, over the course of the last decade, altered many proposals that would have otherwise been inadvertently detrimental to sound municipal government.

While this has been effective, it relies on a reactive rather than a proactive process. The Committee believes that the legislative process would best be served if all ministries were to consider in advance the impact of proposed legislation on municipal liability.

(R3.4) THE COMMITTEE RECOMMENDS THAT THE PROVINCE ESTABLISH A POLICY REQUIRING ALL CABINET SUBMISSIONS INVOLVING AMENDMENTS TO

LEGISLATION OR NEW LEGISLATION TO INCLUDE A STATEMENT AS TO WHETHER AND HOW THE PROPOSAL WILL IMPACT ON MUNICIPAL LIABILITY.

AMENDMENTS TO THE TORT SYSTEM

Joint and Several Liability (The Negligence Act)

In the preliminary report, the Committee recommended that the "joint and several" provisions of the Negligence Act be amended to restore the fundamental concepts of the tort system. The Committee has been overwhelmed by the support received for this important change from all segments of society.

Municipalities and other agencies and associations which, by their very nature, are exposed to a wide variety of risks, and generally carry large amounts of excess insurance coverage or have access to large pools of funds, are particularly vulnerable to the impact of this provision. The Ontario Sports Medicine and Safety Advisory Board, with the assistance of the Parks and Recreation Federation of Ontario, in their report to the Minister of Tourism and Recreation reached the same conclusions as this Committee with respect to the "joint and several" provisions, as did Tourism Ontario.

It should be clearly understood that the Committee is not criticizing counsels for the plaintiff for taking advantage of all available measures to protect the financial future of their clients. As the law stands today, a plaintiff's solicitor has nothing to lose and may have much to gain by routinely naming the municipality in question in bodily injury cases arising in connection with municipal roads or property.

The Committee has learned that while the courts do determine the degree of fault against each defendant, the ultimate amount that each defendant pays does not necessarily correspond to the percentage of fault so determined. While a significant proportion of today's population would carry $200,000 and $500,000 in personal liability coverage as part of home owners' and auto policies respectively, very few individuals would have coverage that exceeds $1 million in either. In order to ensure full payment of damages, particularly in severe bodily-injury cases, a plaintiff's counsel must necessarily look for all other possible defendants. By their very nature, municipalities are, logically, prime targets. If the victim's own insurance or that of another defendant is inadequate or non-existent, any small degree (i.e. 1 per cent) of blame found against a municipality may ensure the total payment of an award.

This is not unfounded hyperbole on the part of the Committee, but rather, the logical consequence of the existing laws. Any lawyer for the plaintiff, acting in the best interest of a client, will and routinely does, exploit this opportunity. In legal circles, the "joint and several" provisions have gained common notoriety as the "1 per cent solution".

The Committee has found numerous examples of the unfair impact that this provision has on "deep pocket" defendants. The celebrated **McErlean v. The City of Brampton and Sarel et al.**, is a case in point. On appeal, regardless of whether the quantum ($6.3 million) is halved, quartered or eighthed, or whether the City's assessment of liability is reduced to 1 per cent, the City will, without question, still bear the burden of paying all the damages awarded with the exception of approximately $100,000 in assets available from Sarel.

Another commonly occuring example involves municipalities which permit their parks and facilities to be used by community groups. If the group running the event is negligent

or any particular person providing a service to the group is negligent and injury results, the municipality which may be only minimally liable, if at all, may bear the substantial portion of the damage award. Numerous such cases were brought to the Committee's attention. One case worth noting involves an Indian Band which set up a "Pow Wow" in a municipal park. One of the concession stands permitted by the Band was an archery game constructed and operated by an individual. The back board of the concession stand, which may have been negligently designed and constructed, was penetrated by an arrow, resulting in a child's permanent and serious injury. The insurers of the Band are currently denying coverage. The municipality is the only remaning defendant with the ability to pay. The damages will, in all likelihood, be substantial. The municipality's insurers and, ultimately the municipality through its premiums and deductibles, are substantially exposed in such a case because of the possibility that a small finding of liability will trigger "joint and several" liability.

In addition, it is self-evident that in cases where co-defendants may be impecunious, underinsured or minors, the joint and several provisions of the Negligence Act place an inordinate amount of pressure, in comparison to their degree of fault, on municipalities and other "deep pocket" defendants to settle such cases.

There are invariably costs to be borne when municipalities are routinely added to the list of defendants that should not be overlooked. The Committee has learned that the start-up costs associated with the preliminary investigations necessary in nuisance cases involving serious injury, are, on average $5,000 to $7,500. These routinely include the costs of outside adjusters, engineers and lawyers. Whether the costs are the direct responsibility of the municipality or its insurer is not the issue. In the end, they must be accounted for, either through municipal operating budgets or through the premiums paid for liability coverage.

As an example of an obvious nuisance case, the Committee cites the instance where a municipality was named in a bodily-injury action on the basis that the municipal road in question was too straight and too-well maintained and, therefore, encouraged speeding.

The Slater Report found that the present tort system is a totally inadequate means of delivering both compensation and deterrence simultaneously. It is the Committee's view that the "joint and several" provisions in the Negligence Act are one of the prime reasons for this perception. As the tort system moves away from fault, it increasingly imposes a disproportionate liability upon municipalities that have done nothing or very little wrong. While historically, the concept of tort liability was based on justified redress for wrongful conduct, recent trends suggest that tort law is gradually moving toward no-fault liability through the increased reliance on the "joint and several" provisions. This can and does result in highly inequitable situations where the costs of compensation are shifted to "deep pocket" defendants such as municipalities. For the tort system to maintain a semblance of fairness and justice, the assessment of fault by the courts, in a liability case, should clearly have a direct bearing on the actual amount of damages payable by each defendant.

For its recommendation to the Minister of Municipal Affairs on the "joint and several" provisions, the Committee would like to endorse and augment the recommendation of the FAIR Committee, a Committee comprised of lawyers from all regions of the province, members of the Canadian Bar Association-Ontario and the Advocates' Society. The Committee believes that there is strong pressure from all segments of society in Ontario to amend this legislation. The fact that FAIR, which represents the views of lawyers acting for plaintiffs as well as defendants, now also recognizes and supports the need for change in this statute, further strengthens the Committee's resolve for change.

As noted earlier, the Ontario Law Reform Commission (OLRC) is due to report to the Attorney General in January of 1987 on the "Contribution Among Joint Tortfeasors". It is the Committee's intention to forward a copy of this report to the OLRC and request that the views it expresses, on behalf of Ontario's municipalities, be taken into consideration in the Commission's deliberations on this important issue.
The committee believes that "joint and several" liability has lost its original purpose which was to impose a duty of care upon negligent persons who are acting in concert.

(R3.5) THE COMMITTEE RECOMMENDS THAT THE DOCTRINE OF "JOINT AND SEVERAL" LIABILITY ONLY BE APPLIED WHEN NEGLIGENT PERSONS ARE TRULY ACTING IN A JOINT VENTURE. OTHERWISE, EACH DEFENDANT SHOULD PAY ACCORDING TO THE DEGREE OF FAULT DETERMINED BY THE COURTS. THE COMMITTEE FURTHER RECOMMENDS THAT THE ONTARIO LAW REFORM COMMISSION DESIGN APPROPRIATE LEGISLATION TO REFLECT THIS CHANGE AS QUICKLY AS POSSIBLE AND THAT THE ATTORNEY GENERAL IMPLEMENT SUCH LEGISLATION WITHOUT DELAY.

Prejudgment Interest (Courts of Justice Act)

Prejudgment interest was introduced in 1977, in an effort to reduce the undue and unfair delays many victims of accidents were experiencing in obtaining deserved settlements from defendants. The argument in favour of prejudgment interest was that insurers for the defence were setting aside reserves for claims they knew they would eventually have to pay and then delaying court cases and settlements for a number of years, while at the same time, earning investment income on these reserves. At that time, it was clearly in the interest of the defence to stall. The legislation was therefore amended to make defendants liable for prejudgment interest on all eventual awards from the date that

written notice of a claim was given, with exceptions for such things as pecuniary loss arising after the date of the order and punitive damages.

The Committee has heard evidence to suggest that in cases of severe bodily injury, at the time a Notice of Claim is filed, there may be little or no reliable information on the extent of the injuries sustained by the victim. This is particularly so in the case of motor vehicle accidents where municipalities are joined as defendants because a plaintiff must file a claim against the municipality within three months of the accident. Consequently, the defendant's insurance company finds itself in the position of being responsible for the prejudgment interest accumulating against an award that must eventually be paid, without the ability to assess the size of settlement to offer.

The Honourable Monte Kwinter, Minister of Financial Institutions, in the panel discussion at the AMO annual meeting this August past, cited changes to the laws governing prejudgment interest as one of the important legislative changes he would support. Both the FAIR Committee and the Canadian Bar Association-Ontario (CBA-O), also recognized the need for changes to the current legislation governing prejudgment interest in their reports to the Slater Task Force. In its report to the Slater Task Force, the CBA-O recommended that in cases of bodily injury, prejudgment interest, with respect to non-pecuniary losses, not commence until the plaintiff has disclosed to the defendant, or the defendant's insurer, the extent and nature of the injuries sustained or offered to make himself or herself available for medical examination. The Committee feels that this is a reasonable compromise to the existing situation. For those acting on behalf of the plaintiff, there would be an incentive to provide the required medical information at the earliest possible opportunity, to be eligible for prejudgment interest accumulation. For the insurer, there is an incentive either to settle once the medical information is available or to provide the plaintiff with a partial payment where some doubt as to the degree of liability or permanence of the injury exists.

(R3.6) THE COMMITTEE RECOMMENDS THAT THE COURTS OF JUSTICE ACT BE AMENDED TO PROVIDE THAT, IN ACTIONS INVOLVING BODILY INJURY, PREJUDGMENT INTEREST WITH RESPECT TO NON-PECUNIARY LOSS NOT COMMENCE UNTIL THE PLAINTIFF HAS EITHER:

1. **DISCLOSED TO THE DEFENDANT, OR THE DEFENDANT'S INSURER, THE EXTENT AND NATURE OF THE INJURIES SUSTAINED; OR**

2. **THE PLAINTIFF HAS AGREED TO MAKE HIMSELF OR HERSELF AVAILABLE FOR A MEDICAL EXAMINATION ON REASONABLE NOTICE, AND THAT THE DEFENDANT WILL PAY ALL RELATED EXPENSES INCURRED AND SUPPLY A COPY OF THE REPORT UPON RECEIPT TO THE PLAINTIFF.**

Structured Settlements or Periodic Payments (Courts of Justice Act)

In the preliminary report, the Committee recommended that the courts be given the authority to impose structured or periodic payment for all, or any part of an award. For the reader's clarification, periodic payments and structured settlements amount to one and the same thing. Periodic payments are referred to in section 129 of the Courts of Justice Act, in connection with a court order, while settlements, on the other hand, generally refer to out-of-court agreements, hence structured settlements refer to payments to be received by a plaintiff, usually from an annuity, set up on his or her behalf as a result of an out-of-court settlement. To reduce the possibility of confusion, the report will use the phrase structured settlement exclusively.

It may also be useful to explain how a structured settlement works. Under a structured settlement, the plaintiff receives payments on a regular basis, generally monthly or yearly. Payments can be tailored to meet the needs of the individual and can include

periodic lump-sum amounts where required. As an example, the plaintiff restricted to a wheelchair may require a van for transportation that needs to be replaced every five years.

Much the same as a mortgage, structured settlements include both interest and principal and are designed to be fully paid out over a given period of time. The life insurance company providing the annuity determines the cost of this annuity on the expected life span of the plaintiff and for a relatively small additional cost, can guarantee the plaintiff payments for life.

Since the preliminary report was released, the Committee has had the opportunity to review a number of briefs on this issue. The Committee has not heard from any source that is opposed to changes that would encourage more structured settlements. The Honourable Monte Kwinter, Minister of Financial Institutions, at the AMO annual meeting in August, cited changes to the laws governing structured settlements and gross-ups as important legislative changes he would support.

The CBA-O's recommended approach calls for the courts to proceed to assess damages in the normal way but without regard to the imposition of personal income taxes on the investment income earned on lump-sum awards. Under this recommendation, the plaintiff would retain the right to decide whether to accept the lump-sum payment or request a structured settlement in the same amount. The Committee disagrees with this approach because, in a practical sense, the plaintiff is not offered an economically viable choice. With a structured settlement, an annuity tailored to the plaintiff's needs would be purchased in the amount of the proposed award which would produce a non-taxable income stream for the duration of the plaintiff's life. A lump-sum payment of the same award amount should produce roughly the same investment income annually but, in this instance, the investment income would be subject to personal

income taxes. Without a gross-up in lieu of taxation, the plaintiff would be considerably undercompensated.

It is the Committee's view that there are a number of good reasons why the courts should be given the authority to impose structured settlements on whatever portion of the award is deemed reasonable. Depending on the circumstances for both the defendant and the plaintiff, the decision to structure may include all, part or none of the award. The Committee offers the following reasons for this approach.

1. Structured settlements invariably decrease the size of the award paid out by the defendant without any loss of award necessarily accruing to the plaintiff. The Committee has heard expert testimony which suggests that on average, the costs of small awards are reduced from 10 to 15 per cent while the costs of larger awards are reduced from 30 to 50 per cent. The total quantum of awards is reduced for a number of reasons. As previously stated, there are no gross-ups required to offset personal income taxes. There is no need to include amounts in the award to cover money-management fees because the investment of the award is the responsibility of the company providing the annuity, while the plaintiff is assured of a steady stream of funds for life.

   The life insurance companies which contract to provide annuities recognize and account for a plaintiff's shortened life expectancy as a result of the injuries sustained in many serious bodily-injury cases. Thus the cost of providing the annuity for life is generally less than the base amount required in lump-sum awards. The Law of Large Numbers allows these companies to predict in this fashion. Their losses and gains on each individual case will even out over their total contracts.

Judges, on the other hand, in determining lump-sum awards, do not have the luxury of averaging losses and gains. Each single case must stand on its own. Therefore, invariably and necessarily, there is a built-in bias in favour of the length of the plaintiff's longevity which directly impacts on the size of the award required.

2. Structured settlements offer long-term security to both the plaintiff and the public sector. For the plaintiff, there is a guaranteed income stream for life. The income stream can be increased on an annual basis by an index that is tied to either the Consumer Price Index (CPI) or set at some other desired rate. For most people, the largest investment encountered in a lifetime is the purchase of a home. By and large, the average individual, when faced with a windfall gain, tends to overstate his or her relative wealth. The Committee heard that the American Life Underwriters' Association has claimed that 95 per cent of all Americans who receive a windfall gain, whether an inheritance, lottery prize, lump-sum award, etc., have dissipated the entire amount in five years. While these statistics may not reflect the actual experience in Ontario, particularly with respect to damage awards alone, they do point out the fact that lump-sum awards, for the average individual, have the potential to be a less stable source of long-term income than structured settlements. While those who are the benefactors of most windfall gains have the option of eventually returning to the work force, those with serious injuries have few alternatives.

In this province, municipalities are responsible for about 80 per cent of the costs associated with providing social assistance benefits. The bulk of the financial responsibility of providing for the needs of those victims that are unfortunate enough to fall into the category of dissipating their award, regardless of whether it is five years hence or any time before their death, falls directly on the

municipal sector. More structured settlements would, therefore, add a measure of security for the public sector as well as for the plaintiffs involved.

3. In awarding a lump-sum, the presiding judge must weigh the arguments of two adversarial groups which tend to take polar positions on most elements that provide the basis for determining the eventual size of an award. With careful consideration and expert testimony, the courts make fairly precise determinations as to the annual income required to sustain a plaintiff. The one variable that repeatedly is most difficult to quantify is the life expectancy of the plaintiff. The victim's predicted life span plays a major role in determining the size of the award. In this instance, structured settlements have proven to be particularly useful. The life insurance companies competing for the contract to provide the annuity to the plaintiff for life, take on the risk of predicting life expectancy and, thus, relieve the courts of the burden of determining more than the appropriate annual income stream required.

The Committee feels obliged to point out the drawbacks to the plaintiff that this approach will have.

1. If the plaintiff dies earlier than expected, the plaintiff's estate will receive the payments for the duration of the guarantee period negotiated. The cumulative amount received by the plaintiff's estate, in such circumstances, will be less than the amount that would have been available under a lump-sum award.

2. For the unforeseen situations where the victim requires more money in a particular time period than the structured settlement is capable of providing, a lump-sum settlement provides a measure of flexibility not available with structured settlements.

3. Another possible drawback mentioned is the fact that, with structured settlements, the plaintiff assumes the risk of inflation, above and beyond the indexed annual rate of increase agreed to in the structured settlement. However, the quantum in lump-sum awards is derived on similar inflationary assumptions and, therefore, the plaintiff inherently accepts the risk in either case. In addition to this, the plaintiff with the lump-sum award currently accepts the risk of increased rates of personal taxation that have been known to occur from time to time.

In weighing the pros and cons, the Committee believes that the case for more structured settlements outweighs the case for court-ordered lump-sum payments alone. Having said this, the Committee believes that the courts should have the power to order the structuring of all, part or none of the award, based on a consideration of the relative positions of both the plaintiff and the defendant. The CBA-O's recommended approach, while it appears to maintain the plaintiff's right to a lump-sum award, is, in actual fact, more restrictive than the Committee's recommended approach where the courts would maintain the power to gross-up settlements if it were in the best interest of either the plaintiff or the defendant to require a lump-sum. The courts would, therefore, retain the power to award judgments based on social conscience, without financial penalty to the plaintiff.

At this time, the Committee feels obligated to point out the obvious. For structured settlements to achieve the desired beneficial results for both plaintiffs and defendants, the presiding judge must order a structured settlement that would achieve the desired annual income stream. It would be inappropriate for a judge to determine the total award and then order that amount to be structured.

(R3.7) THE COMMITTEE RECOMMENDS THAT THE ATTORNEY GENERAL AMEND SECTION 129 OF THE COURTS OF JUSTICE ACT TO GIVE THE COURTS

AUTHORITY TO IMPOSE STRUCTURED SETTLEMENTS FOR ALL, OR ANY PART OF AN AWARD, IN APPROPRIATE CIRCUMSTANCES.

The CBA-O also raises the issue of the different tax treatment, with respect to structured settlements, afforded insurance companies compared with other private companies that have chosen either to completely self-insure or to retain large deductible levels and non-insured individuals. As it stands now, these non-insured individuals and corporate entities are responsible for the income tax payable on the investment income earned on structured settlements. In such cases, structured settlements are an impractical alternative. The Committee believes every effort should be made to encourage the use of structured settlements.

(R3.8) THE COMMITTEE RECOMMENDS THAT THE PROVINCE OF ONTARIO REQUEST THE FEDERAL GOVERNMENT TO BROADEN THE CATEGORIES OF DEFENDANTS IN THE INCOME TAX ACT WHO CAN BE INVOLVED IN STRUCTURED SETTLEMENTS WITHOUT SUFFERING ADVERSE TAXATION.

Gross-Ups For Federal and Provincial Personal Income Taxation

The Honourable Monte Kwinter, Minister of Financial Institutions, at the AMO annual meeting, cited changes to the taxation laws governing gross-ups as one of the important legislative changes he would support. The Slater Report suggests that the present taxation of investment income on lump-sum awards is "nonsensical". The Committee has found that while public opinion appears to be solidly in favour of changing the tax status of lump-sum awards, there is a fair amount of confusion among the general public as to the reasons why this taxation problem exists in the first place. For this reason, a brief explanation of the existing situation, as the Committee understands it, will be undertaken.

First and foremost, the lump-sum award itself, like the payments received from a structured settlement, is not taxable. Only the investment income that is generated each year from a lump-sum award is subject to the personal income tax provisions. Similarly, any investment income earned from that portion of a structured settlement received by a plaintiff and invested, rather than spent, will also be subject to taxation. The difference in the taxation treatment between a structured award and a lump-sum award has to do with who is in possession of the award. In the case of a structured award, the life insurance company that has contracted to provide the plaintiff with the annuity for life holds the award. While it is responsible for paying tax on the income the award generates each year, it can also reserve against the payments it must make to the plaintiff. Its reserves are not subject to taxation and, therefore, in an accounting sense, the tax payable is offset. Companies not involved in insurance which are subject to income taxation, cannot reserve against similar payments. Therefore, these companies involved in self-insurance or carrying large deductibles would be responsible for ensuring the annuity payments to the plaintiff and for paying the tax on the income generated from the structured awards they are involved in.

While the Committee has not heard directly from the Minister of National Revenue on this topic, it is our understanding that the Federal Government is reluctant to consider changes to the Income Tax Act to accommodate lump-sum awards. The Committee believes that, in the short term, it may be prudent to make the changes to the Courts of Justice Act to give the courts the power to impose structured settlements. In conjunction, the Federal Government should be pressed to make the required changes to the Income Tax Act, so that those who choose to take on the responsibility for investing their award themselves, are not unfairly disadvantaged by their choice.

While there is reluctance on the Federal Government's part to change the tax system, the Committee believes that the Provincial Government may have some scope to act regarding its share of personal income taxes collected on lump-sum awards. Currently, the Federal Government collects the Province's share of personal income taxation at source. The Province should ask the Federal Government to forego collecting the provincial share of income taxation on the income generated by lump-sum awards, while encouraging the Federal Government to follow suit. This action would reduce the amount of gross-up required by roughly one third.

(R3.9) THE COMMITTEE RECOMMENDS THAT THE PROVINCE OF ONTARIO DIRECT THE FEDERAL GOVERNMENT TO FOREGO COLLECTING THE PROVINCIAL SHARE OF THE PERSONAL INCOME TAX ON LUMP-SUM AWARDS IMMEDIATELY AND THAT IT REQUEST THE FEDERAL GOVERNMENT TO FOLLOW SUIT BY REMOVING THE INHERENT UNFAIRNESS IN THE INCOME TAX ACT THAT REQUIRES THE COLLECTION OF PERSONAL INCOME TAXES ON THE INCOME GENERATED BY LUMP-SUM AWARDS.

Double Recovery (Collateral Benefits)

Double recovery or collateral benefits as they are formally known, refer to a plaintiff's ability, under certain circumstances, to collect twice for the same injury. As an example, an innocent victim in a car accident may sue the defendant for income lost as a direct result of the accident; while, at the same time, collecting a percentage of his or her normal income through a private insurance plan, purchased either through work or personal initiative.

In the preliminary report, the Committee did not address this issue. Since that time, it has been raised as an area of possible municipal concern. The question that needs to

be addressed in this instance, is whether an individual who has had the foresight to purchase extra private coverage, should be able to benefit from that foresight or, conversely, whether a defendant should be able to benefit from a plaintiff's foresight.

Many of the readers may be aware that certain insurance benefits packages purchased by a municipality for its employees, such as dental and drug plans, ask questions on the application form for benefits payment such as - "Is any claim being made as a result of an accident?", and "Is the patient insured or entitled to benefits under any other group insurance plan?". In this manner, companies providing benefit payments are able to subrogate or fully deduct the benefits paid by another source.

Sources within the Ministry of Financial Institutions indicate that more and more insurance policies are incorporating clauses that try to restrict the policy holder's rights to double recovery. While this may lead to reduced costs from the insurance industry's perspective, it does not address the broader issue of whether the defendant or the victim or neither should have the right to benefit from the victim's prudent financial planning.

The Committee has heard that the courts have upheld the plaintiff's rights to double recovery in a number cases. In **Boarelli v. Flannigan**, the Court of Appeal held that defendants may not claim the benefit of collateral benefits received by a plaintiff in a tort case. In **Vasquez v. Cooperators**, the Court of Appeal ruled that the plaintiff was entitled to accident benefits payable from insurance policies for "loss of income" regardless of whether a real "loss of income" was suffered.

The CBA-O concluded that the plaintiff's rights to double recovery should be limited under most circumstances, on the basis that the present philosophy regarding a tortfeasor is sound and should be continued. That is, that the injured party should be

restored to the position he or she would have been, in had the accident not taken place. FAIR takes a similar stand.

The Committee believes that the intent of this philosophy, surely, was to confirm the defendant's responsibilities in a tort case and not the plaintiff's. In other words, those found liable in tort cases should be financially responsible, to the degree of liability imposed, for restoring the victim to his or her pre-injury position and should not benefit in any way from the victim's resources. As examples, in the case of accidental death, life insurance policy benefits are not subrogated in tort cases. Nor should the fact that a plaintiff may have developed a terminal disease, unrelated to the accident in question, have any bearing on the size of the judgment awarded.

The Committee agrees with the statement that the plaintiffs' rights to claim collateral benefits add to the cost of injury compensation, but suggests that the insurance industry has long been aware of the costs associated with collateral benefits and has accounted for them in the insurance premiums charged. **On the other side of this argument, the Committee has not heard any evidence to suggest that the insurance industry would be willing to refund the premiums paid by policy holders for the years in which double coverage exists, should changes to the rules concerning collateral benefits be enacted.**

(R3.10) THE COMMITTEE RECOMMENDS NO CHANGE TO THE CURRENT LAWS RESPECTING COLLATERAL BENEFITS.

Subrogation (Health Insurance Act)

In the preliminary report, the Committee recognized that the agreement between OHIP and the automobile insurance industry, whereby OHIP-related medical costs are recovered

through bodily-injury and personal-damage insurance policy premiums, rather than through the courts, has been an effective method of dealing with these costs. The Committee recommended that a similar system be established for all liability claims. Since that time, the Minister of Health wrote to the Committee on June 23, 1986, to forward his Ministry's comments and endorsement of this recommendation.

The Committee believes that the introduction of such a mandatory universal system should produce savings, both in the time required to settle claims and in the total dollars expended in settling claims. Consider the possible savings in a severe bodily injury case:

- While past medical costs are readily definable, future medical costs are somewhat more nebulous. The removal of the OHIP portion of this variable from the process should reduce the size of the average award and, at the same time, remove some of the guessing as to the amount of the award that must be dedicated to future medical expenditures.

- With less medical research required, the time required to settle such claims may be reduced, thus sparing the victim some of the worry and uncertainty associated with lengthy trial delays.

- Litigation costs for both the defendant and the plaintiff may decrease.

- Reserves set aside by insurers for future settlements should reflect a corresponding reduction, thus decreasing the amount of policy-holder funds held by the insurance industry in lieu of future settlements.

- Medical costs become a predictable percentage of the annual liability insurance premiums for all insurance companies and their clients.

There are, of course, administrative problems that would require some thought. These include arrangements with municipalities, school boards and other entities participating in reciprocal insurance exchanges and possibly those choosing to self-insure or carry large deductibles.

The Committee believes that subrogating medical costs universally is a necessary step in solving the current cost and coverage problems faced by all consumers of liability insurance in Ontario.

(R3.11) THE COMMITTEE RECOMMENDS THAT THE MINISTER OF HEALTH AND THE SUPERINTENDENT OF INSURANCE IMPLEMENT A UNIVERSAL OHIP SUBROGATION PROGRAM THAT WOULD REMOVE THE COST OF OHIP-RELATED MEDICAL CARE COMPLETELY FROM THE TORT SYSTEM.

Family Law Act, 1986

In the preliminary report, the Committee discussed the history of the Family Law Reform Act from its enactment, in 1978, when the number of family members that could claim out-of-pocket expenses and compensation for loss of guidance, care and companionship was increased, to the enactment of the new Family Law Act in March of 1986, when the requirement for the single suit was removed, as was the obligation of the plaintiff to name, select and advance a claim on behalf of all such claimants. These latest changes were implemented at the request of the Insurance Bureau of Canada as an attempt to cut down on the number of frivolous and minor claims.

Since March of this year, a number of groups, including FAIR and the CBA-O, have suggested further amendments to the Act that would restrict the category of claimants to those individuals who have suffered "serious and permanent loss" of guidance, care and companionship as a result of an accident. The Committee noted earlier both the Advocates' Society's and FAIR's reservations with regard to "serious impairment of bodily function" under the Slater Report's recommendation for a no-tort automobile compensation plan. It was suggested that this is a very subjective test and that verbal thresholds can result in manifestly unfair results. **Is the Committee wrong in assuming the same reservations should exist in the context of this proposed amendment?**

The Committee understands the most recent recommended changes to the Family Law Act, 1986, so few months after the March amendments, are a sincere attempt to address concerns expressed by the insurance industry that acts such as this have dramatically increased their risk exposure and, hence, liability insurance rates in general. The Committee attempted to investigate the impact that the March, 1986 changes have had on the number and size of awards granted under this Act and found that too little time has elapsed and, therefore, the results were inconclusive.

The Committee believes that too little time has elapsed to judge whether the amendments to the Family Law Act, 1986, enacted in March of this year are achieving the desired results.

(R3.12) THE COMMITTEE RECOMMENDS THAT THE INSURANCE BUREAU OF CANADA MONITOR THE IMPACT OF THE AMENDMENTS TO THE FAMILY LAW ACT, 1986 AND BE REQUIRED TO JUSTIFY ANY FURTHER NEED FOR CHANGE.

Limitations Act

In the preliminary report, the Committee recommended that the Attorney General

consider municipal concerns, as expressed in an AMO resolution when redrafting the Limitations Act. A recent decision of Mr. Justice Elmer Smith of the Supreme Court of Ontario on a pre-trial application for summary judgment, has served to heighten the concerns of all municipalities with respect to the validity of the notification and limitation periods which currently exist in municipal legislation.

Mr. Justice Smith ruled, in **Streng et al. v. The Township of Winchester**, that the three-month limitation period in the Municipal Act denies those injured because of alleged negligence on the part of municipalities, equal access to the courts, and thereby infringes on the equality provisions of the Charter of Rights. The problem arises because other Ontario laws, such as the Highway Traffic Act, allow those injured a minimum of two years to start an action for damages in a traffic-related accident.

While the Committee acknowledges the difficulty confronting the courts with differing limitation periods, it knows from first-hand experience, the problems that longer limitation periods without reasonable notification requirements, would provoke for Ontario's municipalities. Currently, provisions in the Municipal Act allow an injured party seven days in urban municipalities and ten days in counties and townships to serve written notice of a claim upon a municipality, where failure to repair is alleged to be the cause of an accident on a municipal road or bridge.

These requirements to give notice can be critical to a municipality's defence. As an example, months after the fact, it would be unlikely that a municipality could mount a reasonable defence against a claim for several thousand dollars worth of body repairs to a vehicle, where the plaintiff alleges it was the gravel on the shoulder of a county road that was too loosely packed which caused the loss of control and subsequent ditching of the vehicle. As most municipal public works departments will attest, a

severe rain storm alone can change the grade on a gravel road by inches in hours. Similarly, evidence of a motor vehicle braking, trajectories and other physical evidence may be lost if notice periods are lengthened or eliminated, seriously hampering a municipality's ability to prepare an effective defence.

In addition, these notification periods play a vital role in a municipality's ability to correct potentially hazardous road conditions quickly in the interest of public safety. As an example, even a municipality with a well-oiled risk-management program may not be alerted to a potentially dangerous pot-hole through its public works inspection program for some time. When an accident does occur, the current notice provisions provide the municipality with information that speeds up the repair process, thus reducing the risk of accident for other road users.

While the standardization of limitation periods in the province may not cause municipalities undue hardship in itself, rudimentary changes to notification requirements without regard to their practical application, may, in many cases, prove unworkable in the municipal context. Common sense dictates that the Attorney General will want to implement limitation and notification laws that are both fair and workable for all segments of society in Ontario. The Committee believes that it is the municipal sector's responsibility to ensure that efforts are taken to inform the Attorney General's staff of the practical problems municipalities face in this regard. The Committee feels that a subcommittee of AMO, made up of representatives from the various municipal associations with hands-on experience in this area, such as municipal engineers and solicitors, could best demonstrate these very real and tangible concerns. The Committee also feels that with such cooperation, a workable approach to municipal notice and limitation periods can be achieved that will satisfy the concerns of all parties.

(R3.13) THE COMMITTEE RECOMMENDS THAT A SUBCOMMITTEE OF THE ASSOCIATION OF MUNICIPALITIES OF ONTARIO (AMO) BE SET UP TO DEMONSTRATE TO THE ATTORNEY GENERAL'S STAFF, THE VERY REAL AND TANGIBLE CONCERNS MUNICIPALITIES HAVE WITH THE PRACTICAL APPLICATION OF LIMITATION PERIODS, WITH THE HOPE THAT A WORKABLE APPROACH TO MUNICIPAL NOTICE AND LIMITATION PERIODS CAN BE ACHIEVED THAT WILL SATISFY ALL PARTIES.

Capping

In the preliminary report, the Committee acknowledged the necessity for the court-imposed cap for pain and suffering (now about $190,000), because of the subjectivity involved in quantifying pain and suffering and suggested that no further capping was required. The Committee believed that there were more effective ways of reducing the size of settlements without impinging upon an individual's rights to recover damages.

In its response, AMO rejected the Committee's stand on capping. As well, many municipalities have endorsed the resolution of the Township of Oxford-on-Rideau, which calls for the Minister of Municipal Affairs to introduce legislation to limit the amount of any liability claim against municipalities and other non-profit organizations to $1,000,000. At AMO's annual meeting in August, a pre-eminent resolution was endorsed that among other considerations, requested legislated ceilings on court awards against municipalities.

The Committee believes that it has successfully demonstrated the need for changes in this report that will, in themselves, limit the size of awards municipalities will face in future, without affecting victims' rights or well-being in any tangible way. The Committee also wishes to point out that it is not without support in the municipal

sector for its views in this regard. The Large Urban Section of AMO endorsed the Committee's position on capping.

The Committee acknowledges that a significant portion of the municipal sector in Ontario shares a strong sentiment with respect to the capping of awards against municipalities and takes this opportunity to alert the Provincial Government to the mounting frustration on the part of municipal councils in dealing with a tort framework that systematically exposes municipalities to ever-expanding and unreasonable levels of liability. It is obvious to the Committee that more and more municipalities are adopting this stand on capping, in response to a perceived notion that the Provincial Government is unwilling to address the fundamental short-comings of the tort system in a meaningful way. However, the Committee remains convinced that there are more effective ways to reduce the size of awards than capping.

(R3.14) THE COMMITTEE RECOMMENDS THAT NO FURTHER CAPPING OF AWARDS BE CONSIDERED.

OTHER LEGISLATIVE CHANGES REQUIRED

The last section in this chapter deals with changes to statutes that the Committee feels, have in some cases, unintentionally caused municipalities to be exposed to greater risk potential and in other cases, will enhance each municipality's ability to secure the liability coverage of their choosing.

Occupiers' Liability Act and Trespass to Property Act

In the preliminary report, the Committee made the statement that

> "much like the speed limit signs that are posted at given points in the municipality advising motorists of the limit, unless otherwise stated, signs limiting the permission or prohibiting the use of municipal lands, unless otherwise posted, would be as practical, and substantially less costly than the current requirements".

The Committee still believes this to be the case, and thanks the Ministry of Natural Resources for its offer to support the amendments required to effect such a change.

It is also interesting to note that the Ministry of Natural Resources has found recent liability insurance settlements to have served as a disincentive to the development of additional lands for public recreational use. It notes that recent trends in court decisions and settlements have counteracted any benefits which might have accrued from the introduction of the Occupiers' Liability Act (OLA). Essentially, landowners have concluded that while this legislation may have limited their liability for accidents on their property, the risks are still too great.

Also of major revelance to this issue is information forwarded to the Committee by the City of Mississauga. Signing will not bring into play the lesser duty of care under the OLA for vacant unimproved lands obtained by urban municipalities and unimproved park lands not accepted for use by urban municipalities because they are not listed in subsection 4(4) of the OLA as premises requiring lesser care. The Committee agrees with the City that, at the very least, such properties should have the same protection afforded to vacant rural premises under the OLA.

(R3.15) THE COMMITTEE RECOMMENDS MUNICIPALITIES BE ACCORDED THE RIGHT TO POST THEIR POLICIES CONCERNING THE USE OF THOSE MUNICIPAL PREMISES ENUMERATED IN SUBSECTION 4(4) OF THE OCCUPIERS' LIABILITY ACT AT VARIOUS STRATEGIC LOCATIONS WITHIN THE MUNICIPALITY AND THAT SUCH SIGNAGE BE EFFECTIVE TO BRING INTO PLAY THE LESSER DUTY

OF CARE SET OUT IN SUBSECTION 4(1) OF THAT ACT, IN RESPECT OF THOSE LISTED PREMISES.

(R3.16) THE COMMITTEE ALSO RECOMMENDS THAT SUBSECTION 4(4) OF THE OCCUPIERS' LIABILITY ACT BE EXPANDED TO INCLUDE THE FOLLOWING PREMISES AS BEING SUBJECT TO THE LESSER DUTY OF CARE SET OUT IN SUBSECTION 4(1) OF THAT ACT:

1. **VACANT UNDEVELOPED PREMISES OWNED BY A MUNICIPALITY OR LOCAL BOARD THEREOF, AS DEFINED IN THE MUNICIPAL AFFAIRS ACT; AND**

2. **RECREATIONAL LANDS OWNED BY A MUNICIPALITY OR LOCAL BOARD THEREOF, AS DEFINED IN THE MUNICIPAL AFFAIRS ACT, WHEN SUCH LANDS ARE USED FOR THE PURPOSES OF RECREATIONAL ACTIVITY BY PERSONS IN RESPECT OF WHOM THE MUNICIPALITY OR LOCAL BOARD DOES NOT ASSUME DIRECT SUPERVISION OR CONTROL.**

The Insurance Act

I - <u>The Standardization of Insurance Clauses</u>

In the preliminary report, the Committee recommended that the Provincial Government, in cooperation with AMO and the major municipal insurers, prepare mandatory standard municipal liability insurance policies, that must be used when quoting on all municipal insurance policies.

There has been some misunderstanding with respect to the intended purpose of this recommendation that requires clarification. The Committee is fully aware of the many disparities among the insurance needs of different municipalities and it is certainly not in favour of further discouraging insurance quotations. It was the Committee's intention that standard clauses be prepared to cover the general needs of most municipalities. Municipalities could then select the appropriate standard clauses that they feel suit their needs and tailor others to meet their individual requirements. It was envisaged that municipalities could choose whatever levels of self-insurance or deductibles they felt comfortable with.

The Committee felt and still believes that such mandatory clauses would remove the possibility of confusion over exactly what coverage is being provided while at the same time, fostering the ability to compare quotes from competing insurers and premiums paid by other similar municipalities.

(R3.17) THE COMMITTEE RECOMMENDS THAT THE MINISTRIES OF FINANCIAL INSTITUTIONS AND MUNICIPAL AFFAIRS PARTICIPATE WITH THE ASSOCIATION OF THE MUNICIPALITIES OF ONTARIO (AMO) AND THE MAJOR MUNICIPAL INSURERS IN THE PREPARATION OF MANDATORY STANDARD MUNICIPAL INSURANCE CLAUSES, TO BE USED IN THE PROVISION OF, AND WHEN QUOTING ON, ALL MUNICIPAL INSURANCE POLICIES.

II - Advance Notice of Change

Over the past year, the public has voiced numerous complaints with regard to the insurance industry's ability to cancel policies with very short notice. Concern has also been expressed with the fact that little notice is generally given with respect to

major changes in the coverage offered, new exclusions or the changes in price for the coverage offered, prior to renewal date.

The Slater Task Force recommended that guidelines be developed to ensure timely notification periods. Mandatory standards would only be imposed if a suitable solution cannot be found.

The Committee agrees with the recommendation of the Slater Task Force that guidelines to ensure timely notification periods be developed and believes that a municipal insurance board, set up to purchase pooled excess insurance for the municipal sector as a whole, should discuss the appropriate guidelines for municipal insurers with the Superintendent of Insurance.

A discussion of mandatory data collection requirements, self-insurers and the Compulsory Automobile Insurance Act can be found in Chapter One.

Environmental Protection Act Part IX (The Spills Bill)

In the preliminary report, the Committee requested time to evaluate the concerns raised by both private industry and the municipal sector regarding the potential impact the proclamation of the Spills Bill was likely to have on municipalities. In addition, the application of the limited pollution liability insurance plan offered by the Pollution Liability Association to municipal operations was also questioned. In the interim, the Committee recommended that the Ministry of the Environment undertake an informational campaign to provide a better understanding of both the Bill and the insurance pool.

Since that time, the Committee has had an opportunity to review a number of the issues raised and offers the following comments.

I - The Spills Bill

The Committee met with representatives of the Ministry of the Environment (MOE) to review the implications the proclamation of the Spills Bill has for municipalities. By its own admission, the legislation, particularly the Regulation, is complex and difficult to understand. However, it defends this complexity on the basis that it is needed to ensure the imposition of more extensive and direct responsibilities on the owners and carriers of chemical contaminants to absorb the cost of immediate emergency clean-up and restoration, irrespective of fault, following a spill.

The main purpose of the Bill has always been to ensure the prompt clean-up of spills into the environment. As a rule, the longer the elapsed time between the spill and clean-up, the more difficult and costly the job becomes. **On the whole, municipalities supported the enactment of this legislation in 1978 and still support the ideals it is attempting to achieve. However, the atmosphere now facing municipalities is considerably different from that of almost a decade ago. There is a far greater perceived risk and, therefore, hesitancy on the part of municipalities to assume responsibility.**

For instance, MOE staff informed the Committee that there are roughly 1,000 incidents reported in any given month in Ontario and about half of these are classified as spills. Most are minor and involve air pollution incidents. The worst are generally tanker truck spills on roads, of which there are about 30 to 33 incidents annually.

If and when a tanker spill occurs in a given municipality, it is the responsibility of the spiller to contain and commence clean-up operations. If the discharger cannot be found, MOE will hire contractors to clean up the spill and then attempt to seek redress from the discharger. Provided the municipality has the expertise, it can also help in

the containment and clean up. While this appears to be fairly straightforward, there are other laws which complicate the issue. For instance, does a municipality which offers to help clean-up a spill for which it was not responsible, run the risk of needlessly exposing itself to liability, in the event that something unforeseen occurs? Ontario does not have "Good Samaritan Legislation" to protect against this type of exposure. On the other hand, municipalities have a responsibility to ensure that their roads are safe. If a municipality does not step in to help, does it run the risk of being held "jointly and severally liable" for damages related to any accident caused by the spill?

There are clearly many questions to be answered regarding the exposure municipalities face as a result of this Bill. While many questions may ultimately have to be answered by the courts, a number of fears could be allayed and many of the nuances could be explained by MOE itself.

For instance, an underground sewage system break or back-up is not a spill; but, if it runs across the road onto someone's property, it is a spill. Salt in an open air pile that leaks into a well is not a spill; but, salt that leaks from a dome or is spilled from a truck does constitute a spill under the Bill.

(R3.18) THE COMMITTEE RECOMMENDS THAT THE MINISTRY OF THE ENVIRONMENT, IN COOPERATION WITH THE ASSOCIATION OF MUNICIPALITIES OF ONTARIO (AMO), SET UP A SERIES OF MUNICIPAL SEMINARS ACROSS THE PROVINCE, ON A ZONE BASIS, TO DEAL WITH THE SPILLS BILL, THE SPILLS ACTION CENTRE, AND THE TRANSPORTATION OF DANGEROUS GOODS.

II - Costs of Clean-Up

Under the current system, a municipality that chooses to become involved in a clean-up operation can recover its costs, depending on the circumstances involved, from the discharger directly, through the courts for claims exceeding $10,000, or from the Environmental Compensation Corporation. All of the above can take time and needlessly impose an element of doubt about the municipality's ability to recover its costs. MOE staff members suggest that the costs associated with clean-up rarely exceed $30,000. While this may be true, an outlay of that size is still significant to many municipalities in this province and there is always the potential for millions of dollars of costs. For example, as of the writing of this report, the Town of Chapleau is facing the possibility of a contaminated water supply due to a Hydro transformer explosion that spilled 230 litres of oil containing PCB's into the municipality's water supply. While there may be no imminent danger of long-term contamination in this particular case, a spill of this magnitude could have substantial long-term financial repercussions.

The Committee feels that, if the Ministry of the Environment truly believes that the swiftness of clean-up is the most critical element to the success of a clean-up operation and that municipalities are instrumental, in many cases, in ensuring this promptness, then it should remove the element of financial risk and potential for liability from the recovery of costs process.

(R3.19) THE COMMITTEE RECOMMENDS THAT THE MINISTRY OF THE ENVIRONMENT REIMBURSE MUNICIPALITIES DIRECTLY AND PROMPTLY FOR THE COSTS THEY INCUR IN THE CLEAN-UP OF ANY SPILL FOR WHICH THEY ARE NOT DIRECTLY RESPONSIBLE.

III - Emergency Municipal Phone Numbers

It was suggested to the Committee that it would be helpful to the Ministry of the Environment and its Spills Action Centre, which offers 24-hour emergency service 365 days a year, if each municipality had an emergency number that could be utilized at any time, in the case of a spill. The Committee agrees that this would serve a useful purpose. As it stands now, many municipalities cannot be reached after normal business hours.

(R3.20) THE COMMITTEE RECOMMENDS THAT EACH MUNICIPALITY DESIGNATE AN EMERGENCY NUMBER THAT CAN BE CALLED AFTER NORMAL BUSINESS HOURS IN CASE OF AN EMERGENCY. FURTHER, THE COMMITTEE RECOMMENDS THAT THE MINISTRY OF MUNICIPAL AFFAIRS LIST THIS EMERGENCY NUMBER IN THE MUNICIPAL DIRECTORY PUBLISHED EACH YEAR.

IV - Pollution Liability Association Insurance (PLA)

A copy of a document prepared by the Metropolitan Toronto staff, which contained a long list of concerns with respect to the pollution liability insurance offered through the Association Pool, was submitted to the Committee through the Regional Solicitors' Group. The Committee naturally shared their concerns and invited a response from the Ministry of the Environment.

Subsequently, a submission was received from Mr. Allan O'Donnell of O'Donnell & Frank, Barristers, the individual who was given the responsibility of setting up the insurance pool for the provincial government. In the Committee's estimation, Mr. O'Donnell adequately addressed each of the expressed concerns. But, perhaps, of primary importance was a statement of summation by Mr. O'Donnell to the effect that rural

municipalities would probably not have any risks that would justify purchasing this coverage and he urged municipalities to examine their operations with this in mind. Ministry of the Environment staff also expanded upon this line of thought, suggesting that the PLA policy was primarily designed for those corporations handling and carrying a lot of chemicals. Since most municipalities do not transport contaminants, the policy would not likely suit their general needs.

Mr. O'Donnell also suggested that municipalities are more likely to require an Environmental Impairment Liability Policy, depending on the potential exposure within each municipality. This is often an additional policy that may be obtained, with or without purchasing out an exclusion for sudden and accidental spills. He cautioned that buying out this exclusion is expensive. This fact was attested to by the Region of Hamilton-Wentworth which wrote to the Committee on June 18, 1986, expressing concern with the cost of environmental impairment coverage, in spite of offering to increase its deductible from $50,000 to $500,000.

The Committee has found that not one municipality has purchased insurance through the Pollution Liability Association Insurance Pool, nor is any likely to do so because the Association does not offer blanket coverage that would include all municipal exposures, only site-specific coverage. In short, the Committee has reached the conclusion that this insurance coverage was not designed with municipal operations in mind and likely provides very little in the way of useful protection for them. As well, many municipalities feel they have adequate environmental impairment protection through their general liability policy. Still others, such as Hamilton-Wentworth, may have decided that what is available, is not worth purchasing. The Committee's main concern rests with those municipalities that may be confused as to what coverage they really have or need.

V - Available Publications

In addition to the proposed seminars recommended by the Committee and co-sponsored by the Ministry of the Environment and AMO, there are a number of publications on various aspects of Part IX of the Environmental Protection Act that are available and worth reading.

1. **AMO Newsbill, April 1986**

An excellent bulletin on the impact of the Spills Bill and the revised Regulation. This publication spells out areas of municipal concern and suggests a number of ways for municipalities to reduce their potential exposure to the occurrence of spills. All municipalities are encouraged to review the contents of this newsbill.

2. **Spills - Municipal Requirements, Rights and Compensation,** Canadian Bar Association - Ontario, Publication of the Institute of Continuing Legal Education

3. **Emergency Response Guide for Hazardous Goods,** Transport Canada

The Committee is also aware of three timely publications that can be obtained free of charge from the Ministry of the Environment.

4. **Ministry Policies Respecting Spills and Enforcement**

5. **A Guide to the Environmental Compensation Corporation**

6. **The Spills Action Centre and Ontario's Spills Bill.**

CHAPTER FOUR - RISK MANAGEMENT

INTRODUCTION

In the preliminary report, the Committee recommended further investigation in the field of risk management, as the Committee believed ignoring the benefits of reduced exposure would be irresponsible and may well have a detrimental effect on municipalities' marketability for future liability protection.

The Committee also recommended that educational and promotional programs be made available to the municipal sector, so as to assist in the effective implementation of a risk-management program tailored to municipal requirements.

Many associations agreed with and supported the Committee's preliminary report recommendation. The Ontario Municipal Administrators' Association (OMAA) encouraged municipalities to implement active risk-management programs. The Union des municipalites du Quebec stated that,

> "If any relief on costs is to be hoped for in the mid or long term, it has to come from the claim side of the premium dollar. In this regard, risk management and its derivatives will play a prime role in holding down ever escalating costs and hopefully decreasing the amount of claim impact."

The Ontario Task Force on Insurance recommended that,

> "The Insurance Bureau of Canada and The Insurers' Advisory Organization, together with the Insurance Brokers Association of Ontario, should accept and adopt as their mandate the promotion of risk management services through appropriate arms of the insurance industry, in order that public education of risk management services and loss prevention control can be coordinated, promoted, and the public assisted, particularly those insureds facing difficulties with respect to liability insurance coverage."

A risk-management program offers practical solutions to the wide range of liability risks municipalities find themselves exposed to today. Risk management is a "self-help" program, the part of the solution within the control of municipalities exerting efforts to minimize or reduce their exposure to liability risks.

Many municipalities are already "managing their risks"; although, not all municipalities follow the policies and procedures of a formal risk-management program. **Regardless of the type of risk-management program undertaken, whether it be formal, semi-formal or informal, the Committee believes risk management is not an option.**

WHAT RISK MANAGEMENT CAN DO FOR YOU

Risk management is an effective means of conserving resources and avoiding unnecessary waste arising out of accidental loss. Many accidents can be prevented by inspecting municipal properties on a regular basis and implementing safety-awareness programs. It has always been extremely important to reduce the risk of lawsuits against municipalities and is particularly relevant now when liability premiums are high and people seem eager to sue for damages.

A risk-management program should result not only in financial savings, but also in a noticeable reduction in both the number and magnitude of claims and, hopefully, the cost of liability insurance in the long run. It raises the level of awareness of municipal staff and the general public for the need to limit circumstances and situations which increase the potential for liability.

Although a risk-management program is an excellent method for reducing claims and expenses, the Committee recognizes that not all municipalities can afford to maintain

a formal program, both in terms of time and cost.

Some small municipalities with limited populations may not have felt the need for a formal risk-management program in the past because they believed there were few risks associated with the provision of their municipal services. The Committee cautions that even municipalities which provide limited services such as gravel roads can be implicated in serious bodily-injury accidents and, consequently, can be sued for the same amount as a municipality with many heavily travelled and paved expressways. This is not to suggest that every municipality should adopt a formal risk-management program. An informal program, such as a citizen report network, may be suitable for many municipalities and just as effective. Indeed, many small municipalities have this kind of informal risk-management program in operation today.

Large urban municipalities are more financially able to hire a full-time risk manager whose responsibilities include all activities related to the insurance needs of the municipality. Many municipalities have taken this step already, while more are contemplating hiring a full-time risk manager to handle their insurance needs.

Recent tight market conditions have also served to better establish the risk-management functions within smaller municipalities. A number of municipalities have assigned a staff member, such as the treasurer, to act as risk manager along with his/her other duties, while others have considered the joint employment of a risk manager with neighbouring municipalities. While the amount of time this person devotes to risk management is limited, significant benefits can accrue from adopting a conscious effort toward risk management.

The Committee considers the following inherent benefits of a risk-management program to be worthy of note. Risk-management programs will encourage:

i) **identification of exposures that should be insured and the seeking of adequate coverage or retention for them;**

ii) **improvement of internal communications through coordination and centralization of records;**

iii) **an emphasis on the management of claims to control and/or reduce loss;**

iv) **promotion of safety awareness and training resulting in cost savings and reduction in injuries; and**

v) **in the long term, a stabilization of insurance costs.**

THE PROCESS

Through investigation, the Committee has come to believe that regardless of the level or formality of a program, there are five steps that a municipality should consider in establishing an effective risk-management program. They are:

i) **Exposure Identification** - identifying the resources for which the municipality is responsible and the accidental loss exposures that could materially affect them;

ii) **Risk Evaluation** - the quantifying of the risks which have been identified. This process involves both a judgment of the possible size or severity of a potential loss and an estimate of the frequency with which that loss will occur in the future;

iii) **Risk Control** - the reduction and/or elimination of risk or loss through careful procedures, practices and record keeping in security, personal safety, fire prevention, auto safety, environmental protection and emergency planning;

iv) **Risk Funding** - the provision of sufficient funds to cover losses, if they occur, by the most effective use of internal and external financial resources, including insurance;

v) **Risk-Management Administration** - the development of administrative techniques to carry out the risk-management process most effectively, using skills both inside and outside a municipality.

Identifying resources and loss exposures can be accomplished in a number of ways. Checklists, questionnaires, interviews with department heads and physical inspections of properties are a few methods of identifying risks. There are advantages and disadvantages to each of these methods, depending on the amount of time available and the size of a municipality.

The next step is to measure the financial risks inherent in each exposure in terms of frequency and severity. The objective is to devote the maximum attention to those exposures that are likely to have the greatest financial impact on a municipality.

Risk evaluation is a continuous process undertaken simultaneously with exposure identification. Both form the basis for deciding which risks require insurance and what loss control measures are needed.

The most important step in the risk-management process is risk control. The objective is the elimination and/or reduction of not only loss, but risk itself. The Committee

feels that effective risk management in larger municipalities can sometimes be seriously fragmented and uncoordinated because the responsibility rests with more than one department simultaneously, for example fire and police. Municipalities must recognize the need for a coordinated approach to risk-management programs that define risk-control areas, policies and procedures. Departments can then follow procedures realistically, that can be monitored on a periodic basis. Responsible control of risks should ultimately lead to lower insurance premiums.

The objective of risk funding is to secure the lowest possible direct cost for risk funding which is sufficient to cover losses as they occur, including adequate funds to protect against the worst possible loss.

While insurance remains the most frequently used method of handling certain risks of accidental loss, it is by no means the only method or the least expensive. Higher deductibles, self-insurance and group purchasing are other methods of financing risks.

The administration of a risk-management program requires continuous direction and careful attention. An effective program consists of a written policy and an established organization with detailed responsibilities. Communication networks are also important.

Less formal systems may be most effective in small municipalities. For example, citizen phone (report) networks have proven to be successful, as long as: citizens are encouraged to report hazards and know whom to call, municipalities remove the risk and follow-up procedures are undertaken. In other words, a well-established informal program can be as beneficial as a formal program in managing risks.

In summary, the Committee believes there are three points to emphasize in risk management. They are:

i) **Risk management is for everyone;**

ii) **Risk management is an investment; and**

iii) **Risk management is not an option.**

RISK-MANAGEMENT SOURCES AVAILABLE

In the course of the Committee's extensive research and discussions with representatives of various organizations, many publications and organizations providing sources of information on risk management were identified. The Committee feels that these sources of information are extremely important to municipalities and will be discussed in turn. As available, contact names and addresses are provided in Appendix C.

Publications

One source of information on risk management is the **Hazard Elimination/Limitation Program (HELP)** which was developed by the Ontario Good Roads Association (OGRA) in response to the concerns of municipalities over municipal liability insurance costs. HELP is a new accident-prevention program which seeks public participation by urging municipalities to encourage citizens of the community to report hazards on municipal property, such as streets, sidewalks, schools, ravines, landfill sites and parks. The program recommends that municipalities take full advantage of local resources and promotes risk management through the media, service clubs, police, schools and other agencies, as a method of generating public participation to increase safety consciousness in the community. Once a council has adopted this program, it may set

up a hotline, appoint a HELP coordinator and launch public service ads. HELP kits are available from OGRA at a cost of $10 for members and $20 for non-members. **The Committee would like to commend the Ontario Good Roads Association for their lead in encouraging municipal risk-management programs and for the timely availability of HELP kits.**

The Union of British Columbia Municipalities (UBCM) publishes a monthly newsletter called "UBCM NEWS". The June, 1986 issue deals primarily with risk management and indicates the availability of a 19-page publication entitled **Risk Management: Overview and Practical Suggestions**, available at a cost of $3.50. The organization is also in the process of producing a risk-management video.

The Public Risk and Insurance Management Association and the International City Management Association have jointly published a book entitled **Risk Management Today: A How-to Guide for Local Government** as part of ICMA's continuing Practical Management Series.

Other publications available are **Government Risk Management Reports, Municipal World** and **Moody's Municipal Issues, May-June 1986.** These publications are available for a subscription fee.

Organizations

In Ontario, the **Insurance and Risk Management Branch** of the Ministry of Government Services assists each ministry to minimize their operational risks. This involves an identification and evaluation of the potential for bodily injury, property loss or damage, as well as controlling risks through security systems and safety programs. Municipalities may utilize this branch to answer questions concerning risk management

and as a source of contacts for other risk-management agencies and associations.

The **Society of Public Insurance Administrators of Ontario** is a non-profit organization that educates municipal staff handling insurance. The Society's objectives are to exchange knowledge; promote cooperation among municipalities; collect and disperse information; and develop training programs. Membership is open to employees and elected members from any local government in Ontario. The Society arranges for lawyers, brokers and insurance people to speak to its 54 members. Campaigns have been launched to inform small municipalities of the Society's existence and the worthwhile services they provide. It is the Society's hope that smaller municipalities will join. To date, all member municipalities have populations greater than 25,000. One reason for this may be that until recently, small municipalities have not felt the need for risk management. Cost should not be a factor, since the membership is only $50 and the four seminars are $25 each. Members are also encouraged to join the Ontario Risk and Insurance Management Society once they attain an advanced level of risk management.

The **Ontario Risk and Insurance Management Society** (ORIMS) provides a more advanced level of training programs for risk managers than the Society of Public Insurance Administrators of Ontario. The membership fee is $225 plus additional costs to cover seminars. Less than one per cent of municipalities are currently members of ORIMS and the majority of members are from the private business sector.

The **Urban Finance Officers Association of Ontario** (UFOA) is a professional organization whose membership is comprised of senior municipal finance officers of Ontario municipalities with populations in excess of 25,000. The Executive Committee of the Association has established a subcommittee to examine the current liability insurance "crisis" and to prepare submissions on the subject to AMO and to senior

levels of government. The subcommittee has also taken on the task of developing general guidelines and codes of practice on risk management for municipalities. Given the limited time and financial resources available, the Association has estimated that it could not have such a handbook completed by 1988. **The Committee commends the UFOA for its commitment to develop risk-management guidelines for municipalities but emphasizes that there is an urgent need for this information.**

When the Ministry of Municipal Affairs recently referenced, in "Background", a weekly Ministry publication, the availability of a risk-management manual entitled "Alberta Urban Municipalities Association (AUMA) Loss Prevention Program", at a cost of $30 per copy. Despite the fact that this manual reflects both the legislative and insurance environment of Alberta, not Ontario, AUMA reports that they have been deluged with requests from Ontario municipalities. **The Committee therefore believes that not only is there an urgent need for risk-management information in Ontario but also municipalities are demanding assistance NOW.**

The Committee recognizes the time and financial constraints under which the UFOA will be working in undertaking such a project; however, the Committee is convinced that municipalities require assistance in addressing risk management long before 1988.

(R4.1) THE COMMITTEE RECOMMENDS THAT THE MINISTRY OF MUNICIPAL AFFAIRS ADDRESS AN URGENT NEED AND PROVIDE THE NECESSARY FINANCING TO ALLOW THE URBAN FINANCE OFFICERS ASSOCIATION (UFOA), IN COOPERATION WITH THE ASSOCIATION OF MUNICIPALITIES OF ONTARIO (AMO), TO PRODUCE A TIMELY RISK-MANAGEMENT HANDBOOK, FOR USE BY BOTH LARGE AND SMALL MUNICIPALITIES. SUCH FUNDING SHOULD INCLUDE THE COST OF PUBLICATION, CIRCULATION AND ANY EXPERT ASSISTANCE

REQUIRED, TO PRODUCE A COMPREHENSIVE MUNICIPAL RISK-MANAGEMENT HANDBOOK FOR ALL MUNICIPALITIES IN ONTARIO, AS EARLY IN 1987 AS POSSIBLE.

Some insurance brokers in Ontario offer risk-management services to their municipal clients, by providing inspections of municipal properties and encouraging municipalities to appoint Liability Review Committees to manage risk, examine exposures and make recommendations to minimize risks. One company presents papers on risk management and loss prevention to municipal associations, conferences, panels and groups, including municipal employees, across the province.

The **Alberta Association of Municipal Districts and Counties** (AAMD&C) and the **Alberta Urban Municipalities Association** (AUMA) are taking steps to alert their member municipalities of the benefits of risk management. AUMA has produced a 200 page loss-prevention manual and has contracted the services of an insurance advisor who will visit municipalities, look at their buildings and operations, and provide them with advice as to ways in which they may be exposing themselves to accidents and what they can do to rectify the problems. AAMD&C has hired a loss-prevention officer to travel the Province of Alberta and speak to supervisors involved in the municipalities' day-to-day operations about ways to avoid losses. Both Associations are considering loss-prevention seminars for municipalities. Information on those programs can be obtained by writing to AUMA.

The **Public Risk and Insurance Management Association** (PRIMA) is an information clearing house on public risk management and insurance issues in the United States. Membership has increased to over 950 public agencies, such as states, cities, counties, school districts and highway authorities. Its programs and services are intended to improve risk management professionalism in local government.

The **International City Management Association** (ICMA) is a professional and educational organization for chief appointed management executives in local government. ICMA was founded, in 1914, for the purpose of strengthening the quality of local government through professional management and to develop and disseminate new approaches to management, through training programs, information services and publications. ICMA and PRIMA have worked closely together since PRIMA's formation in 1978.

The **Michigan Municipal League** assists members through various training and educational efforts, including dissemination of the "Municipal Risk Management Newsletter", development of a Municipal Liability Prevention Manual, the conduct of safety seminars and sponsorship of specific loss control activities.

It is the Committee's hope that municipalities and other organizations will utilize these sources of information to realize the many benefits of reducing their risk and liability exposures. Contact names and addresses for the publications and organizations mentioned in this chapter, have therefore been provided, where available, in Appendix C.

CONCLUSION

To fulfill its mandate, the Committee successfully conducted an extensive inquiry into many municipal insurance issues and has provided a number of detailed recommendations that, if implemented, will alleviate many of the current uncertainties in the liability insurance market and improve the perception of municipal risk exposures within that market.

It is the Committee's sincere hope that the Province will recognize the urgency of the recommendations set out in this report and will act quickly to implement them.

Responses to this report should be made by January 31, 1987 and addressed to:

Mr. L.J. Close
Director
Municipal Finance Branch
Ministry of Municipal Affairs
777 Bay Street
13th Floor
Toronto, Ontario
M5G 2E5

APPENDIX A

MUNICIPAL LIABILITY INSURANCE SURVEY, TABLE ONE - GRAPHS AND CHARTS

FIGURE 1

AVERAGE GENERAL LIABILITY PREMIUMS PER MUNICIPALITY

(excluding Metro Sector)

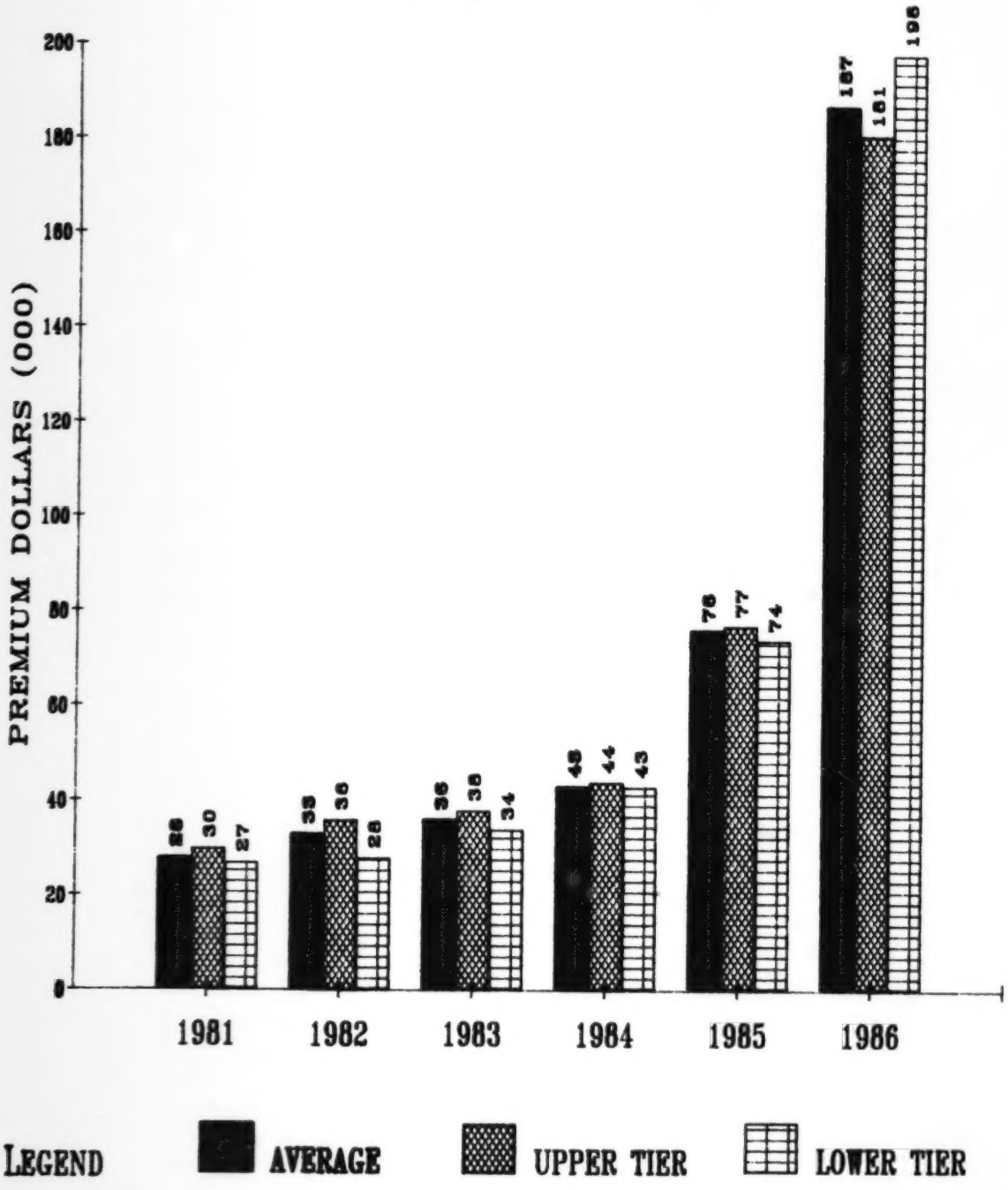
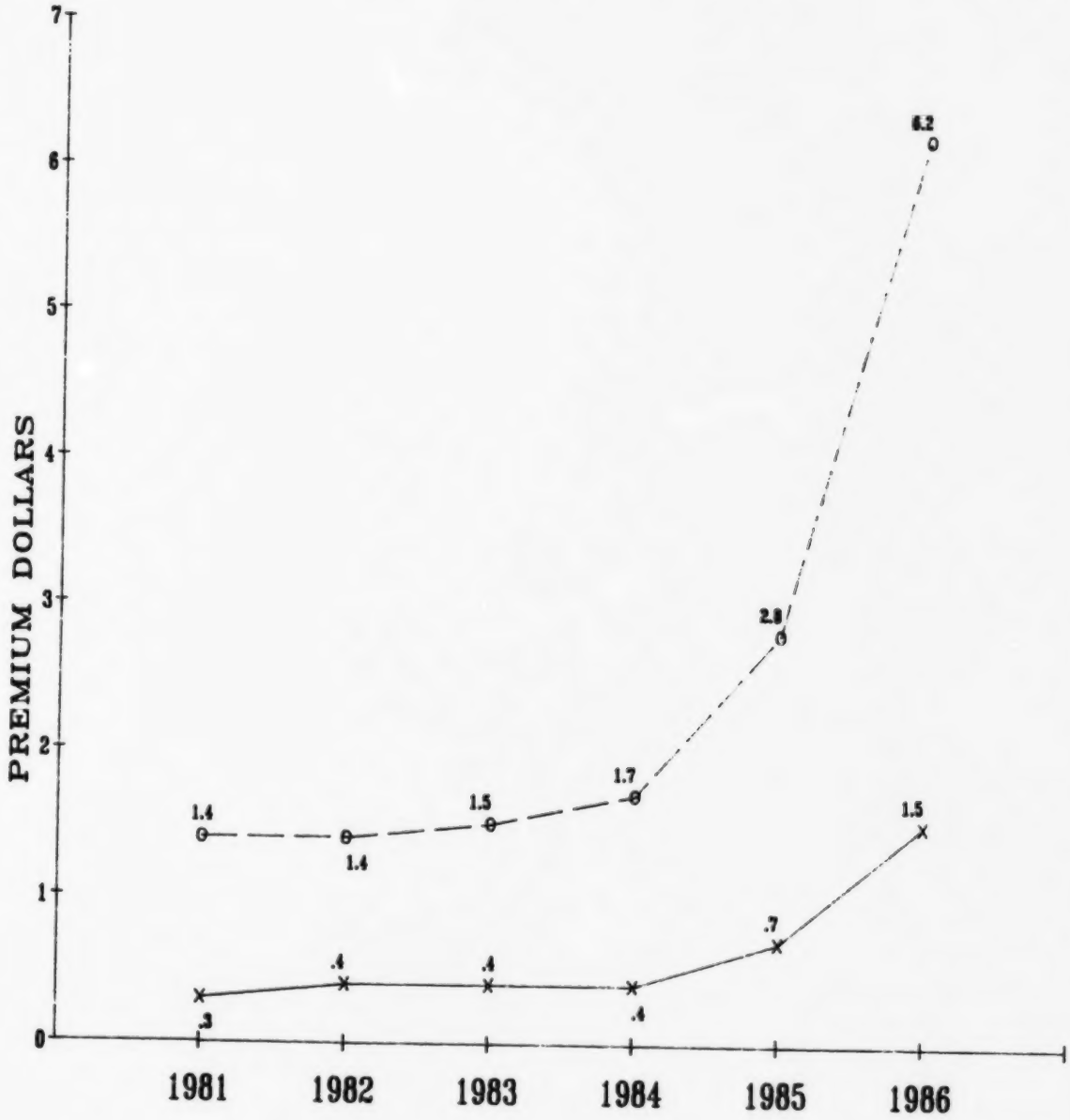


FIGURE 2

AVERAGE GENERAL LIABILITY PREMIUMS PER HOUSEHOLD

(excluding Metro Sector)



LEGEND UPPER TIER —— LOWER TIER — —

FIGURE 3

GENERAL LIABILITY PREMIUMS AS A PERCENT OF NET GENERAL DOLLAR LEVY (excluding Metro Sector)

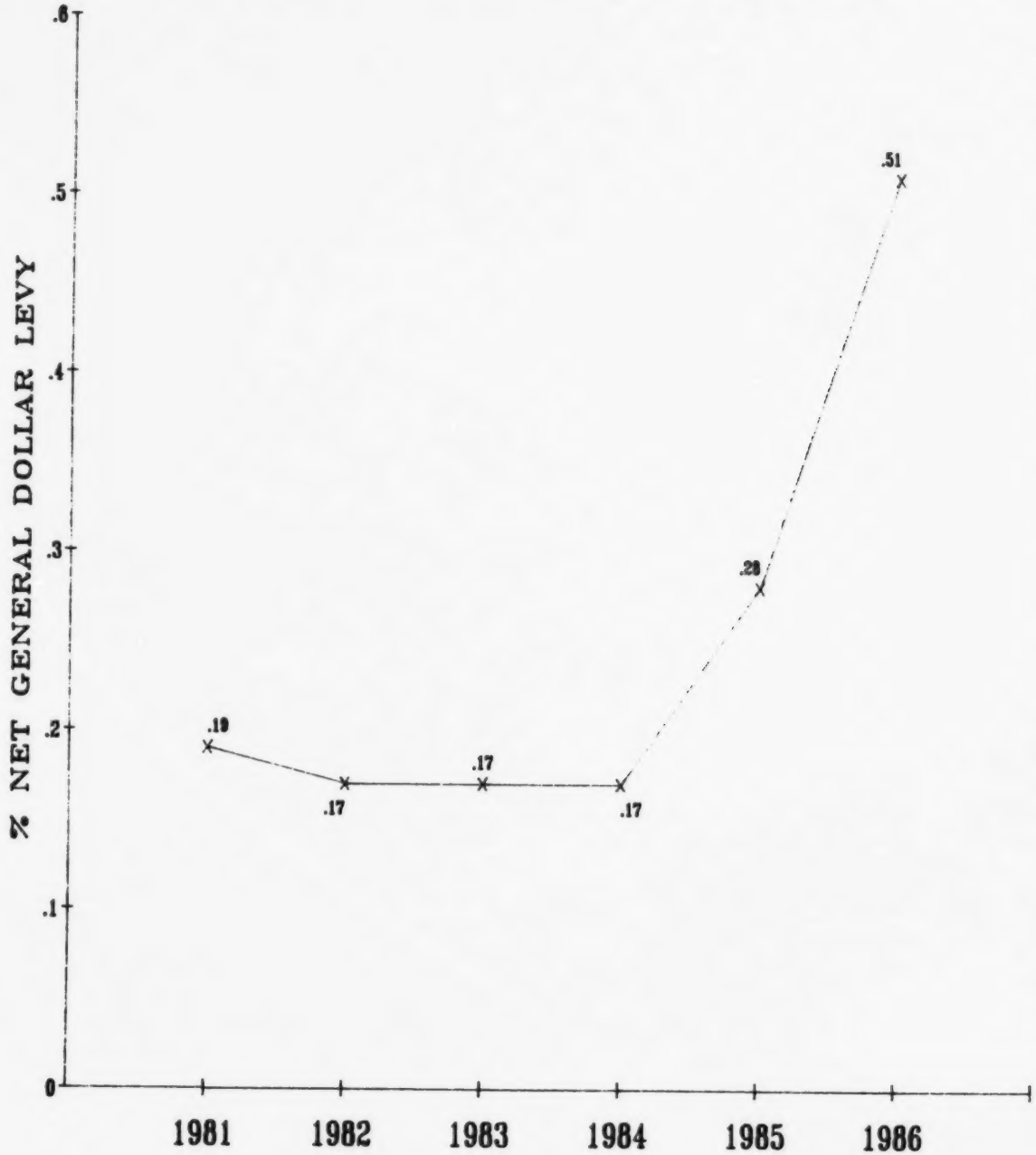


FIGURE 4

GENERAL LIABILITY DEDUCTIBLES

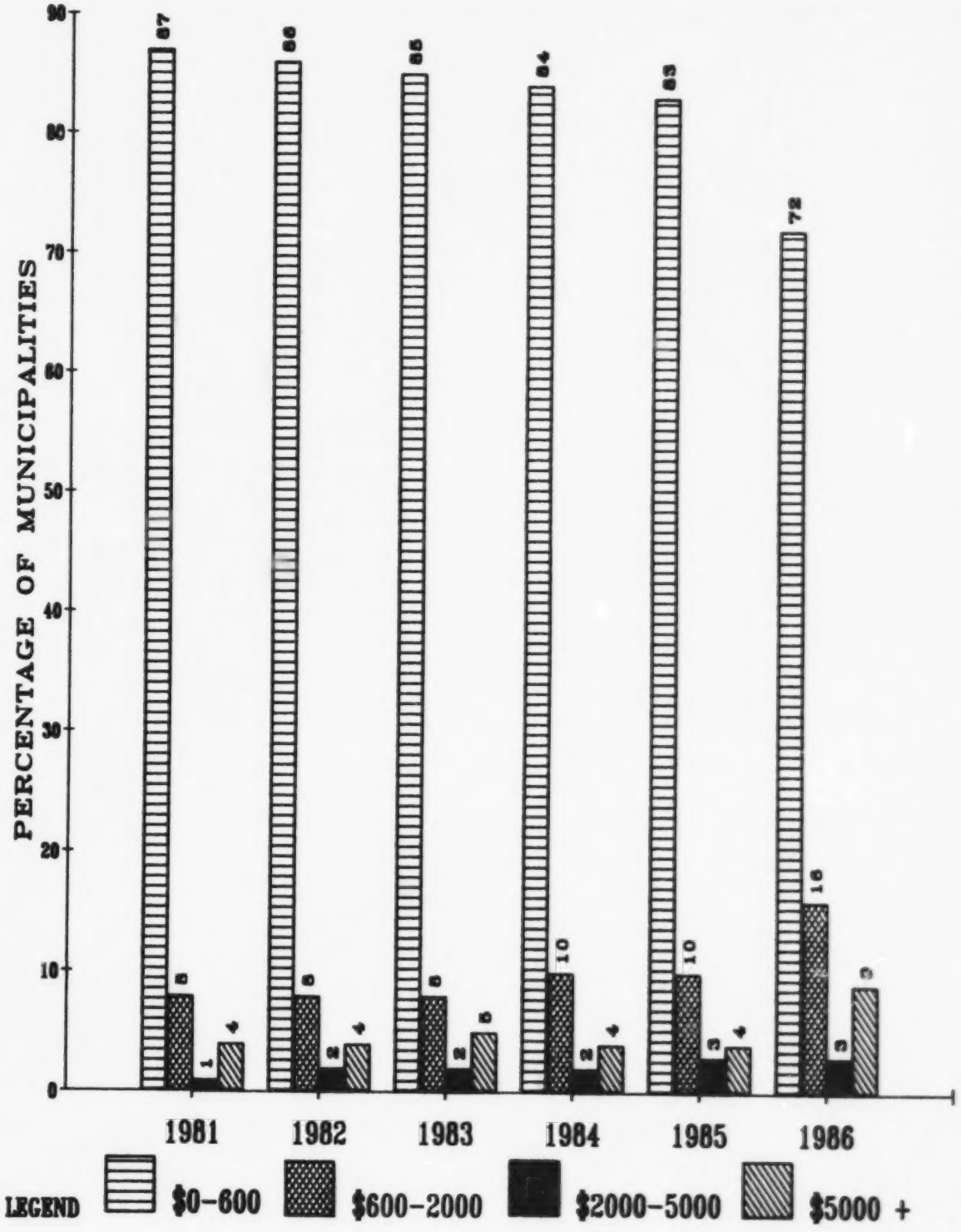
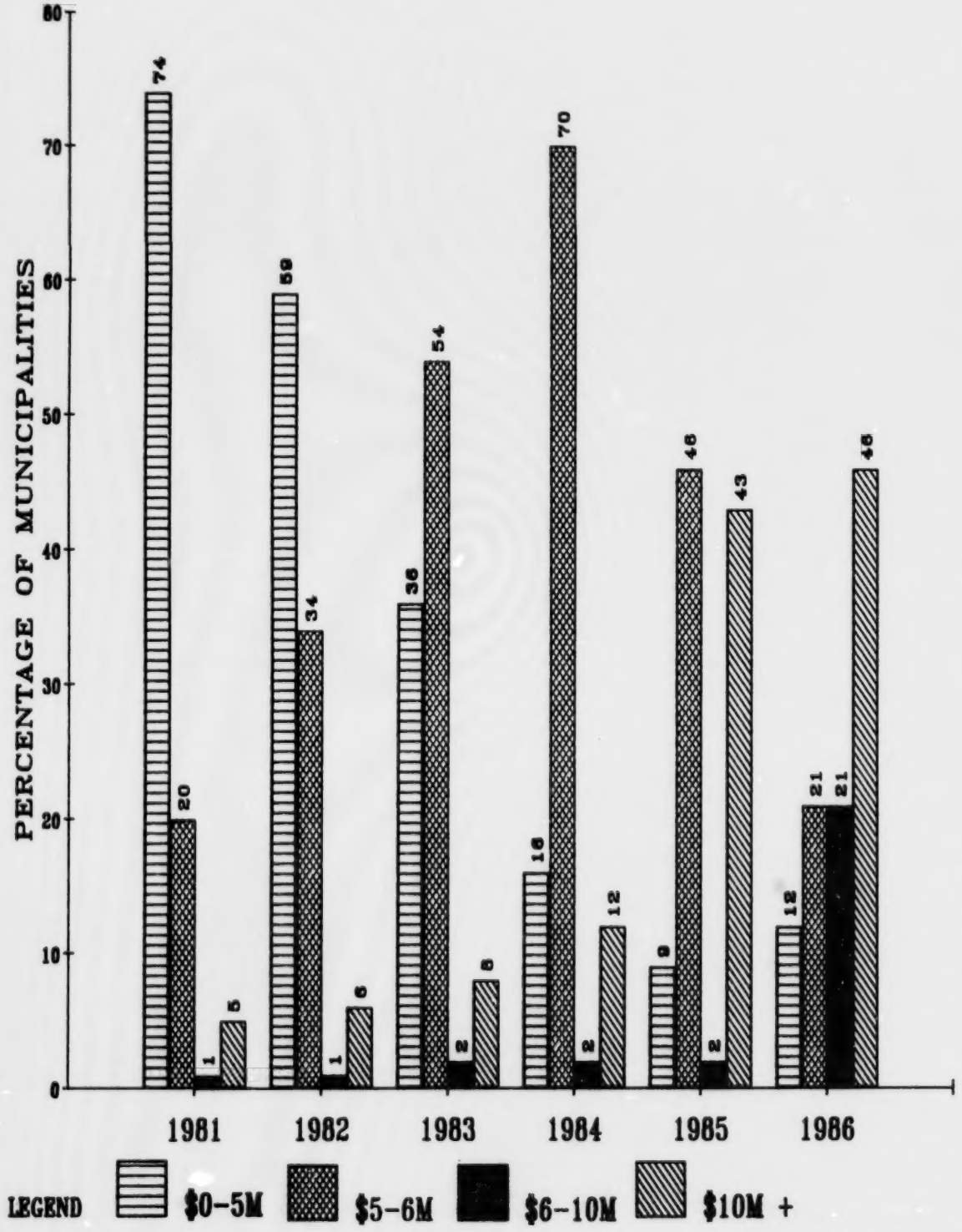


FIGURE 5

GENERAL LIABILITY LIMITS



COMPOSITION OF SAMPLE
GENERAL LIABILITY INSURANCE **TABLE 1**

Sector	Actual # Mun.	1981 # Mun.	1982 # Mun.	1983 # Mun.	1984 # Mun.	1985 # Mun.	1986 # Mun.
Metro Toronto	7	7	6	6	7	7	6
Regions	99	67	68	68	68	67	44
County Cities	18	16	17	17	17	17	9
Counties	535	292	308	312	314	319	119
District Cities	4	2	2	2	2	2	2
Districts	176	83	90	96	100	98	44
Total	839	467	491	501	508	510	224

CHANGE IN AVERAGE GENERAL LIABILITY PREMIUMS
PER MUNICIPALITY **TABLE 2**

Sector	1982/81 %	1983/82 %	1984/83 %	1985/84 %	1986/85 %	1986/81 %
Metro Toronto	(1.3)	2.0	252.8	28.6	50.3	585.9
Regions	18.3	14.0	17.5	68.1	126.2	502.2
County Cities	24.3	17.8	24.0	158.9	92.1	803.2
Counties	2.1	4.3	4.6	87.2	136.9	393.9
District Cities	(44.9)	1.9	1.7	15.4	269.8	143.5
Districts	(18.4)	.8	22.3	4.2	170.2	183.4
Province (excluding Metro Sector)	14.9	11.6	18.8	75.6	146.5	558.3

CHANGE IN AVERAGE GENERAL LIABILITY PREMIUMS PER HOUSEHOLD

TABLE 3

Sector	1982/81 %	1983/82 %	1984/83 %	1985/84 %	1986/85 %	1986/81 %
Metro Toronto	.02	.04	1.27	.93	1.01	3.28
Regions	.16	.16	.32	1.59	4.88	7.12
County Cities	.05	.12	.09	1.23	7.00	8.49
Counties	.09	.10	.04	1.80	4.67	6.70
District Cities	(.95)	.04	(.02)	.38	4.45	3.90
Districts	(.20)	.10	.37	1.54	4.71	6.52
Province (excluding Metro Sector)	.08	.14	.20	1.51	5.20	7.12

GENERAL LIABILITY PREMIUMS AS A PERCENT OF NET GENERAL DOLLAR LEVY

Table 4

Sector	1981 %	1982 %	1983 %	1984 %	1985 %	1986 %
Metro Toronto	.06	.05	.05	.13	.17	.18
Regions	.15	.15	.14	.15	.24	.42
County Cities	.10	.10	.10	.10	.20	.75
Counties	.44	.42	.38	.37	.59	1.03
District Cities	.21	.12	.11	.10	.13	.43
Districts	.40	.32	.30	.32	.48	.75
Province (excluding Metro Sector)	.19	.17	.17	.17	.28	.51

APPENDIX B

PROVINCE-WIDE STATISTICAL DATA BASE REQUIREMENTS

PROVINCE-WIDE STATISTICAL DATA BASE REQUIREMENTS

The establishment of a credible province-wide statistical data base would require the collection of the following:

Level of Deductible;
Written Premiums - by calendar year;
Earned Premiums - by calendar year;
Number of Claims - split by accident year;
Paid claims amount - split by accident year;
Incurred claims - split by accident year.

Claims data should be collected so that they can be analyzed by size of claim bands; for example,

$0 - $10,000
$10 - $25,000
$25 - $50,000
$50 - $100,000
$100,000 - $500,000
$500,000 and over.

Also, the data base, reported as indicated split by accident year would allow for the production of run-off development triangles (both for paid and incurred) as follows:

	REPORT YEAR							
ACCIDENT YEAR	0	1	2	3	4	5	6	7
1979	X	X	X	X	X	X	X	X
1980	X	X	X	X	X	X	X	
1981	X	X	X	X	X	X		
1982	X	X	X	X	X			
1983	X	X	X	X				
1984	X	X	X					
1985	X	X						
1986	X							

Claims should be coded by source as follows:

Villages;
Towns;
Townships;
Counties;
Cities;
Regions.

Claims data should be coded so as to identify the cause of loss. This should include, for example:

Roads;
Health Unit;
Homes for the Aged;
Water/Sewage,

Waste/Landfill;
Police;
Fire Department;
Day Care;
Parks and Recreation Facilities (i.e. Arenas, Ball Diamonds, etc.);
Transit System;
Airport;
Miscellaneous.

It should also indicate for each claim, whether it is a bodily-injury claim, a property damage claim or other.

While a finer breakdown may seem appropriate in some areas, it is doubtful that it would be feasible or lead to credible statistics.

In order to study claims settlements at some future date, it would be necessary on each claim file to record the following information:

Date of occurrence;
Date of reporting;
Dates and amounts of successive reserve estimates of both losses and loss adjustment expenses;
Dates and amounts of partial payments;
Dates and amounts of expense payments;
Date of settlement of claims, and amounts;
Final closing date of claims after all expenses are paid;
Dates of reopening (if reopened);
Date and particulars of closing of reopened claims.

APPENDIX C

RISK MANAGEMENT
SOURCES OF INFORMATION

Ontario Good Roads Association
Box 128
St. Thomas, Ontario
N5P 1B6
(519) 631-6820

Urban Finance Officers Association of Ontario
Mr. Jack Gartley (Chairman)
Commissioner of Finance
Regional Municipality of Durham
60 Bond Street West
Box 618
Oshawa, Ontario
L1H 8B6

Mr. Richard Taylor
Executive Director
Union of British Columbia Municipalities
Suite 15
10551 Shellbridge Way
Richmond, British Columbia
V6X 2W9
(604) 270-8226

Mr. Gary Vamplew
Manager
Insurance and Risk Management
Ministry of Government Services
1st Floor, Drew Building
25 Grosvenor Street
Toronto, Ontario
M7A 1N3
(416) 965-6254

Mr. T.P. Buchanan
Executive Director
Alberta Urban Municipalities Association
P.O. Box 4607
Postal Station S.E.
Edmonton, Alberta
T6E 5G4
(403) 433-4431

Ontario Risk and Insurance Management Society
Mr. Frank Wilson (President)
Manager of Risk Management Abitibi-Price Inc.
Box 21
Toronto-Dominion Centre
Toronto, Ontario
M5K 1B3

Mr. George D. Goodman
Director
Michigan Municipal League
1675 Green Road
Ann Arbour, Michigan 48105
U.S.A.

International City Management Association
1120 G. Street N.W.
Washington, D.C. 20005
U.S.A.
(202) 626-4600

Mr. Mac Dunbar
Executive Director
Association of Municipalities of Ontario
Suite 805
100 University Avenue
Toronto, Ontario
M5J 1V6

Society of Public Insurance Administrators of Ontario
Mr. George Peterson (President)
Insurance Administrator
City of Scarborough
150 Borough Drive
Scarborough, Ontario
M1P 4N7
(416) 296-7237

Directeur General
Union des municipalites du Quebec
625 boul. Dorchester ouest
bureau 700
Montreal, Quebec
H3B 1R2
(514) 878-9226

Mr. Milt Sather
Secretary
Ontario Municipal Administrators' Association
City Hall
59 Carden Street
Guelph, Ontario
N1H 3A1
(519) 837-5602

Mr. J.D. Edworthy
Executive Director
Alberta Association of Municipal Districts and Counties
4504 - 101 Street
Edmonton, Alberta
T6E 5G9

Public Risk and Insurance Management Association
1120 G Street N.W.
Suite 400
Washington, D.C. 20005
U.S.A.
(202) 626-4650

Moody's Municipal Issues
Municipal Department
Moody's Investors Service
99 Church Street
New York, New York 10007
U.S.A.
(212) 553-0300
Volume 3, Number 2
May-June, 1986

Government Risk Management Reports
Tilling Last, Nelson & Warrne, Inc.
722 Post road
Darien, Connecticut 06820
U.S.A.
(203) 655-9791
March, 1986, Vol. VII, No. 12
April, 1986, Vol. VIII, No. 1

Municipal World Inc.
Box 399
St. Thomas, Ontario
(519) 633-0031

APPENDIX D

PRESENTATIONS MADE TO THE COMMITTEE

PRESENTATIONS MADE TO THE COMMITTEE

Allan O'Donnell, O'Donnell and Frank, Barristers

Bill Andrus, Actuary, Raymond Murrill, Vincent Brewerton, Assistant Actuary, The Wyatt Company

Michael Cochrane, Counsel, Ministry of the Attorney General

Michael A. Hogan, Vice-President, Osborne and Lange Inc.

Frank Cowan, President, and John Clark, Vice-President, Frank Cowan Company Ltd.

John St. Pierre, John Gunderman, Joe Rinaldo, Ron Chittick, and Gil Paterson, Urban Finance Officers Association

Bert Raphael (Advocates' Society), Raphael, Wheatley & MacPherson

George Peterson, Society of Public Insurance Administrators of Ontario

H. E. Hartley, President, OME Insurance Brokers Limited

A. Dickson Wood, Counsel, Dupont Canada Inc.

Guy Savage, Chairman, ROMA Insurance Program Inc.; Don Rodgers, Secretary-Treasurer and Bill Fox, Director, ROMA Insurance Board

Robert Brown, Department of Statistics and Actuarial Science, University of Waterloo

Richard L. Frost, CAO for the Regional Municipality of Peel and President of the Ontario Municipal Administrators' Association and John Robertson, City Manager, City of Sarnia, on behalf of the Ontario Municipal Administrators' Association

Dr. George Arras, Senior Policy Analyst, Corporate Policy and Planning Branch, Gary Zickovitz, Head of the Spills Action Centre and Peter Belling, Contingency Planning Officer, Spills Action Centre, of the Ministry of the Environment

Frank McKellar, M.A., McKellar Structured Settlements Inc.

J. Murray Davison, Q.C., Bassel, Sullivan & Leake

APPENDIX E

BRIEFS SUBMITTED TO THE COMMITTEE

BRIEFS SUBMITTED TO COMMITTEE

1. Municipal Insurance in Ontario: Facts and Opinions, O.M.E. Insurance Brokers Limited.

2. Brief to the Ontario Task Force on Insurance, The Advocates' Society, February 28, 1986.

3. Municipal Liability Insurance "Self-Funding" Concept (Alternatives), M.A. Hogan, Vice-President, Osborn & Lange Inc.

4. Risk Management: What is Risk Management? George Peterson, Society of Public Insurance Administrators of Ontario.

5. Risk Management, Frank Cowan Company Limited.

6. Submission to the Ontario Task Force on Insurance of the City of North Bay, dated February 28, 1986, Michael B. Burke, City Solicitor.

7. A Submission to the Provincial Task Force on Insurance, the Regional Municipality of Niagara, February 28, 1986.

8. 1986 Liability Insurance Coverage and Related Matters, Harry Poch, Metropolitan Toronto Legal Department.

9. Regional/District and Metropolitan Solicitors' Group Insurance Recommendations, Harry Poch, Metropolitan Toronto Legal Department.

10. Facts About Municipal Self-Insurance Pooling in Michigan, Eugene F. Berrodin and Robert J. Kish, Michigan Municipal League.

11. Proposal to the Ministry of the Environment regarding Part IX of the Environmental Protection Act, submitted by the Canadian Manufacturers' Association, the Canadian Chemical Producers Association, the Ontario Petroleum Association, the Ontario Truckers' Association, the Canadian National Railway and the Canadian Pacific Railway, November 24, 1983.

12. Exploratory Meeting on the Subject of Municipal Risk Management, Association of Municipalities of Ontario, November 19, 1985.

13. Metro Group Liability Insurance Program, City of Toronto, December 4, 1985.

14. Preliminary Brief on Liability Insurance, Urban Finance Officers Association of Ontario, March 6, 1986.

15. Reciprocal Insurance Exchanges, Financial Institutions Division, Ministry of Consumer and Commercial Relations, March, 1986.

16. Tax Gross-Ups and Periodic Damage Payments - Why Not Structured Judgments? Western General Mutual Insurance Company, March 5, 1986.

17. Report on Municipal Liability Insurance to Advisory Committee on Municipal Insurance, Municipal Engineers Association.

18. The Spills Action Centre and Ontario's Spills Bill, by V.G. Zikovitz, Ministry of the Environment, June 18, 1986.

19. Proposal on Self-Insurance to the Honourable Bernard Grandmaitre, Minister of Municipal Affairs, Roma Insurance Board.

20. AMO Report 86-8: Response to the Preliminary Report of the Advisory Committee on Municipal Liability Insurance, The Association of Municipalities of Ontario as approved by the AMO Board of Directors, May, 1986.

21. Liability Alert, Volume I No. 13, Capitol Impact Publications, August 31, 1986.

22. The Response of the Ministry of Transportation and Communications to the Report of the Ontario Task Force on Insurance, July 15, 1986.

23. A Report in Response to the Ontario Task Force on Insurance, The Committee for Fair Action in Insurance Reform (FAIR).

24. Risk Management: Overview and Practical Suggestions, Union of British Columbia Municipalities, April, 1986.

25. A Report on Municipal Liability Insurance, Robert L. Brown and Harry H. Panjer, University of Waterloo.

26. Comments on Certain Justice Issues Being Considered by the Ontario Task Force on Insurance, Michael G. Cochrane, Counsel, Policy Development Division, Ministry of the Attorney General, Member of Interministerial Advisory Committee Task Force on Insurance, April, 1986.

27. Response to the Minister of Tourism and Recreation, Mr. John Eakins, Concerning his Request for a Reaction to the Provincial Task Force Report on Insurance, submitted by The Ontario Sports Medicine and Safety Advisory Board with the assistance and support of the Parks and Recreation Federation of Ontario, July, 1986.

28. O.M.A.A. Presentation on Insurance, Ontario Municipal Administrators' Association.

29. AUMA Loss Prevention Manual, Alberta Urban Municipalities Association, 05/01/86.

30. Comments of the Ministry of the Attorney General of Ontario on the Final Report of The Ontario Task Force on Insurance, Richard F. Chaloner, Acting Deputy Minister, Ministry of the Attorney General, August 11, 1986.

31. Comments from ROMA Insurance Program Inc. Board to the Advisory Committee to the Minister of Municipal Affairs

32. Letter from Ontario Good Roads Association, August 1, 1986.

33. Comments on Ministry of Municipal Affairs Advisory Committee on Municipal Insurance Preliminary Report, City of Mississauga, June 23, 1986.

34. Reciprocal Insurance Exchange Agreement for School Boards in the Province of Ontario, co-sponsored by the Ontario Association of School Business Officials and The Ontario School Trustees' Council, August 15, 1986.

35. Ministry Policies Respecting Emergencies, Spills and Enforcement, Ministry of the Environment.

36. The National Municipal Liability Insurance Crisis: A Federal Perspective, National Center for Small Communities, January 14, 1986.

37. Structured Settlements, Frank McKellar, M.A., McKellar Structured Settlements Inc., October 7, 1986.